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Supreme Court, U.S.
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In The

Supreme Court of the United States

STATE OF IDAHO,

Petitioner,

v.

DALE CARTER SHACKELFORD,

Respondent.

On Petition For Writ Of Certiorari To The Idaho Supreme Court

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED

Pursuant to Idaho state law existing at the time, after being found guilty by a jury of two counts of first degree murder and other criminal offenses, Respondent Dale Carter Shackelford was sentenced to death by a judge without the jury having been instructed regarding the statutory aggravating factors found by the judge that made Shackelford eligible for the death penalty. During post-conviction proceedings, while Shackelford's direct appeal was stayed, this Court decided *Ring v. Arizona*, 536 U.S. 584, 588 (2002), concluding statutory aggravating factors are the functional equivalent of an element of a greater offense and must, under the Sixth Amendment, be found by a jury. While the trial court found *Ring* error because the jury was not instructed on the aggravators, the court also applied the harmless error doctrine and reasoned the jury's verdicts established the multiple murder aggravator even though the jury had not been instructed regarding the aggravator. Relying upon *Sullivan v. Louisiana*, 508 U.S. 275, 279-80 (1993), the Idaho Supreme Court reversed and ordered that Shackelford be resentenced because the harmless error doctrine would violate "the jury trial guarantee for any court to hypothesize a guilty verdict that was never in fact rendered." App. at 78.

1. Because statutory aggravating factors are the functional equivalent of a greater offense and the

QUESTIONS PRESENTED – Continued

failure to instruct the jury regarding the multiple murder aggravator did not vitiate all of the jury's findings, did the Idaho Supreme Court err by concluding *Ring* error is not subject to harmless error analysis?

2. Based upon the jury's verdicts finding Shackelford guilty of two murders and the evidence presented at trial, did the state meet its burden of establishing beyond a reasonable doubt that any *Ring* error involving the failure to instruct the jury regarding the multiple murder aggravator was harmless?

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PETITION FOR WRIT OF CERTIORARI TO THE IDAHO SUPREME COURT

The Attorney General for the State of Idaho, on behalf of the State of Idaho, respectfully petitions for a writ of certiorari to review the decision of the Idaho Supreme Court, which overturned Shackelford's death sentence based upon an incorrect conclusion that error under *Ring v. Arizona*, 536 U.S. 584 (2002), is not subject to harmless error analysis.

OPINION BELOW

The opinion of the Idaho Supreme Court is reported at *State v. Shackelford*, ___ P.3d ___, 2010 WL 2163361 (Idaho 2010). App. at 1-80.

JURISDICTION

The opinion of the Idaho Supreme Court was filed June 1, 2010. App. at 1. On June 2, 2010, the supreme court denied the parties' petitions for rehearing "NUNC PRO TUNC May 28, 2010." App. at 100-01. Petitioner requested and received two extensions of time to file its petition for writ of certiorari, to and including October 29, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Due Process Clause of the Fifth Amendment to the United States Constitution provides, "No person shall be . . . deprived of life, liberty, or property, without due process of law."

The Sixth Amendment to the United States Constitution provides, in relevant part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, . . . and to be informed of the nature and cause of the accusation. . . ."

The relevant portion of the Fourteenth Amendment to the United States Constitution provides, "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

The facts leading to Dale Shackelford's convictions for the murders of Donna Fontaine and Fred Palahniuk were summarized by the Idaho Supreme Court:

> Dale Shackelford was convicted of the murders of his ex-wife, Donna Fontaine, and her boyfriend, Fred Palahniuk, which occurred near the Latah County town of Kendrick, Idaho, in May 1999. The state alleged that Shackelford conspired with

Martha Millar, Bernadette Lasater, Mary Abitz, Sonja Abitz, and, John Abitz. Millar and Lasater worked for Shackelford's trucking business, Shackelford Enterprises, in Missouri. The Abitz family lived near the residence where the bodies of Donna and Fred were found. Sonja Abitz was Shackelford's fiancée at the time of the murders, and John and Mary Abitz are Sonja's parents. The alleged conspirators eventually pled guilty to charges related to the murders.

Shackelford and Donna married in Missouri in December 1995 and the relationship ended in the summer of 1997, with the couple divorcing in November of that year. Donna accused Shackelford of raping her in July 1997, and charges were filed in 1998. In the spring of 1999, Donna developed a relationship with Fred and, on May 28, 1999, the two visited Donna's brother, Gary Fontaine, at the home Gary and Donna's daughter owned together outside of Kendrick. The morning of May 29, Donna, Fred, and Gary went to the Locust Blossom Festival in Kendrick, where they met John, Mary, and Sonja Abitz.

After leaving the festival, Gary went to the Abitz's house, but he left around dark, returned home, noticed Donna's pickup in the driveway, and smelled smoke. Gary called the Abitz's house and reported that his two-story garage was on fire. Mary, Sonja, Ted Meske (Mary's brother), and Shackelford arrived at the fire and various individuals tried to extinguish it, but were unsuccessful.

At 7:40 p.m., Latah County Sheriff Patrol Deputy Richard Skiles was called to investigate the fire at 2168 Three Bear Road. When Skiles arrived at the scene, nearly an hour later, he observed several persons – including Gary Fontaine, Mary Abitz, Sonja Abitz, Brian Abitz (Sonja's brother), Ted Meske, and Shackelford – standing near the garage that was completely engulfed in flames. Based upon information obtained from Ted and Shackelford, Deputy Skiles contacted dispatch to have an on-call detective sent "because there was a possibility there could be a suicide victim in the fire." By the time the fire department arrived, the garage had been utterly destroyed. Several hours later, after the fire had been extinguished, two bodies were found in the rubble. The bodies were subsequently identified as the remains of Donna and Fred. At trial, a state fire investigator testified as to his opinion that the fire was arson.

Doctor Robert Cihak conducted autopsies of the remains, which were severely burned. Shotgun pellets were found in Donna's right chest region and a bullet was found in the back of her neck. Dr. Cihak opined that the bullet wound was fatal and was inflicted when Donna was still alive. A bullet was also found in Fred's body behind the upper breastbone, which Dr. Cihak concluded was the cause of death. Dr. Cihak offered his opinion that Donna and Fred were dead at the time of the fire.

> Shackelford was indicted on February 11, 2000, and charged with two counts of first-degree murder, first-degree arson, conspiracy to commit first-degree murder, conspiracy to commit arson and preparing false evidence. Trial began on October 16, 2000, and concluded December 22, 2000. The jury returned guilty verdicts on all counts charged in the Indictment. Sentencing commenced on August 27, 2001, and, on October 25, 2001, the district court read its Findings of the Court in Considering the Death Penalty. As to Donna's murder, the court found that the State had proven beyond a reasonable doubt two statutory aggravating factors: I.C. § 19-2515(h)(2) (2000) and I.C. § 19-2515(h)(10) (2000). As to Fred's murder, the court found the statutory aggravating factor under I.C. § 19-2515(h)(2) (2000). After weighing the mitigating factors against the individual statutory aggravating factors, the court concluded that the mitigating factors were not sufficiently compelling to render the death penalty unjust, and sentenced Shackelford to death for both first-degree murders.

App. at 2-5 (footnotes omitted).

Pursuant to I.C. § 19-2719(6) (1995), Shackelford's direct appeal was stayed pending completion of post-conviction proceedings. On June 24, 2002, while Shackelford's post-conviction case was pending and his direct appeal was stayed, the Supreme Court decided *Ring*, 536 U.S. at 588, expressly overruling,

in part, *Walton v. Arizona*, 497 U.S. 639, 649 (1990), which had held a judge sitting without a jury was permitted to find statutory aggravating factors even if necessary for imposition of the death penalty. The Court concluded, because statutory aggravating factors "operate as 'the functional equivalent of an element of a greater offense,' the Sixth Amendment requires that they be found by a jury." *Ring*, 536 U.S. at 609 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 494 n.19 (2000)).

The trial court denied all guilt phase post-conviction relief. App. at 5-6. Addressing the question of whether Shackelford was entitled to post-conviction sentencing relief based upon *Ring*, the trial court concluded, "the jury found [Shackelford] guilty of the first degree murders of both Donna Fontaine and Fred Palahniuk at the same location and on the same date. Those verdicts, standing alone, appear to establish the existence of multiple murders which constitutes a statutory aggravator beyond a reasonable doubt" under I.C. § 19-2515(h)(2) (2000).[1] App. at 94. However, concluding *Ring* allegedly mandates the jury "to weigh mitigating circumstances against aggravating factors to determine whether a death sentence is appropriate," the court granted post-conviction sentencing relief and ordered that

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[1] This statutory aggravator was recodified at I.C. § 19-2515(9)(b) (2006), but still reads as follows: "At the time the murder was committed the defendant also committed another murder."

Shackelford be resentenced before a jury. App. at 99. Based upon its grant of sentencing relief under *Ring*, the trial court concluded Shackelford's remaining post-conviction sentencing claims were moot. App. at 6.

In a consolidated appeal under I.C. § 19-2719(6) (1995), the Idaho Supreme Court affirmed Shackelford's convictions. App. at 80. Addressing whether Shackelford's death sentence had to be vacated because of *Ring*, the Idaho Supreme Court rejected the trial court's reasoning that the jury's verdicts established the multiple murder statutory aggravating factor. App. at 74-80. Relying upon *Sullivan v. Louisiana*, 508 U.S. 275, 279-80 (1993), the supreme court concluded the trial court's decision was constitutionally infirm because harmless error analysis would violate "the jury trial guarantee for any court to hypothesize a guilty verdict that was never in fact rendered" and "the Sixth Amendment requires more than appellate speculation about a hypothetical jury's action." App. at 78-79 (internal quotations and citation omitted).[2] Both parties petitioned for rehearing, which was denied on June 2, 2010, "Nunc Pro Tunc May 28, 2010." App. at 100-01.

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[2] Because of its decision regarding harmless error, the Idaho Supreme Court declined to address the trial court's conclusion that *Ring* allegedly requires the jury to weigh mitigating factors. App. at 80.

REASONS FOR GRANTING THE PETITION

The Idaho Supreme Court's conclusion that *Ring* error is "structural" and cannot be reviewed for harmless error is an important federal constitutional question and one upon which there is now a conflict and significant controversy. *See* Supreme Court Rule 10(b), (c). In Idaho, harmless error is analyzed under the federal standard enunciated in *Chapman v. California*, 386 U.S. 18, 23-24 (1967). *State v. LePage*, 630 P.2d 674, 680-81 (Idaho 1981). This creates a substantial question under the Constitution because the Idaho Supreme Court's decision establishes the court's belief that *Sullivan*, 508 U.S. at 279-80, precludes harmless error analysis involving *Ring* error.

Moreover, the Idaho Supreme Court's decision conflicts with this Court's decisions, federal appellate court decisions and the decisions of other state supreme courts. Review by writ of certiorari to a state supreme court is appropriate under such circumstances to determine whether the Idaho Supreme Court "has properly interpreted, applied, or extended a prior Supreme Court decision in a given situation." R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* at 273(j) (citing cases including *Bullington v. Missouri*, 451 U.S. 430, 431 (1981) (certiorari granted regarding whether reasoning of prior Court precedent applies to a different kind of sentencing hearing) and *Oregon v. Mathiason*, 429 U.S. 492, 493 (1977) (certiorari granted because state court "has read *Miranda* too broadly")).

Finally, the analysis used by the Idaho Supreme Court will have a continuing impact on capital cases involving *Ring* error, particularly in those states, like Idaho, that relied upon this Court's conclusion in *Walton*, 497 U.S. at 649, that judge sentencing was not constitutionally infirm. As those cases weave their way through laborious state appellate and federal habeas review, the courts, both state and federal, need to know whether *Ring* error is subject to harmless error analysis, particularly since the Idaho Supreme Court's decision precludes harmless error analysis if **any** mistake is made in instructing the jury regarding statutory aggravating factors.

A. Conflict With This Court's Precedent

The Idaho Supreme Court's decision in *Shackelford* conflicts with several decisions of this Court on an important question of federal constitutional law and resulted in an improper application of this Court's precedent.

In *Chapman*, 386 U.S. at 21-24, this Court rejected the contention that all federal constitutional errors must be deemed harmful requiring automatic reversal and adopted a harmless error test requiring the state to establish "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." In *Arizona v. Fulminante*, 499 U.S. 279, 306 (1991), the Court noted the numerous constitutional errors to which

harmless error has been applied and explained, "most constitutional errors can be harmless."

However, errors "affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself" are structural defects, "which defy analysis by 'harmless-error' standards." *Id.* at 309-10. Admittedly, this Court has concluded an erroneous reasonable doubt jury instruction is structural error and cannot be reviewed for harmlessness. *Sullivan*, 508 U.S. at 280. However, underlying the Court's decision was the recognition that an erroneous reasonable doubt instruction "vitiates *all* the jury's findings," which then permits the reviewing court to "only engage in pure speculation – its view of what a reasonable jury would have done" if properly instructed on the reasonable doubt standard. *Id.* at 281 (emphasis in original).

This is in stark contrast to cases in which a judge decides only one of the elements of an offense. In *Johnson v. United States*, 520 U.S. 451, 463-64 (1997), the judge decided the materiality element in a federal perjury prosecution in violation of *United States v. Gaudin*, 515 U.S. 506 (1995). Addressing whether such error is structural, this Court explained, "it is by no means clear that the error here fits within this limited class of cases" and that "[t]he failure to submit materiality to the jury . . . can just as easily be analogized to improperly instructing the jury on an element of the offense." *Id.* at 469. While the Court declined to address this exact question, it decided the error did not require correction because

"there is no basis for concluding that the error 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings'" – the fourth prong of the plain error standard under F.R.C.P. 52(b) – particularly in light of the overwhelming evidence supporting the materiality element that was decided by the judge and not the jury. *Johnson* at 469-70.

Based upon *Johnson*, and other cases applying harmless error analysis when an improper instruction is given regarding an element of the offense, this Court concluded the omission of an element of the offense in the jury instructions is not structural error. *Neder v. United States*, 527 U.S. 1, 8 (1999). "Unlike such defects as the complete deprivation of counsel or trial before a biased judge, an instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Id.* (emphasis in original). The Court recognized that omission of the materiality instruction "did not 'vitiat[e] *all* of the jury's findings,'" but merely "prevent[ed] the jury from making a finding on the element of materiality." *Id.* at 10 (emphasis in original) (quoting *Sullivan*, 508 U.S. at 281). Addressing the harmless error standard that should be used, the Court explained, "a court, in typical appellate-court fashion, asks whether the record contains evidence that would rationally lead to a contrary finding with respect to the omitted element. If the answer to that question is 'no,' holding the error harmless does not 'reflec[t] a denigration of the constitutional rights involved.'" *Id.*

at 19 (quoting *Rose v. Clark*, 478 U.S. 570, 577 (1986)).

In *Mitchell v. Esparza*, 540 U.S. 12 (2004), this Court applied the principles from *Neder* to error associated with *Apprendi*, 530 U.S. 466.[3] Esparza was charged with aggravated murder during the commission of an aggravated robbery. *Id.* at 13. Because the indictment failed to charge him as a "principal offender" as required by state law, Esparza contended he had not been convicted of an offense for which a death sentence could be imposed under Ohio law. *Id.* at 14. The Ohio Court of Appeals rejected Esparza's contention, concluding literal compliance with the statute was not required. *Id.* In federal habeas, the Sixth Circuit concluded the Ohio court's decision was an unreasonable application of *Apprendi* because Ohio's failure to charge in the indictment that respondent was a principal was the functional equivalent of dispensing with the reasonable doubt requirement and that, under *Sullivan*, harmless error analysis was inappropriate. *Mitchell*, 540 U.S. at 15. Addressing the question of harmless error, the

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[3] In *Apprendi*, 530 U.S. at 483, *Ring*'s precursor, the Court concluded the Sixth Amendment does not permit a defendant to be "expose[d] . . . to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone." Despite holding otherwise in *Apprendi*, at 496-97 (relying upon *Walton*, 497 U.S. at 647-49), two years later the Court concluded, "*Apprendi's* reasoning is irreconcilable with *Walton's* holding in this regard, and today we overrule *Walton* in relevant part." *Ring*, 536 U.S. at 58.

Supreme Court relied upon multiple cases, particularly *Neder*, to conclude the Ohio court's decision was a reasonable application of Supreme Court precedent, and that "the jury verdict would surely have been the same had it been instructed to find as well that the respondent was a 'principal' in the offense." *Mitchell* at 16-18.

In *Washington v. Recuenco*, 548 U.S. 212 (2006), the Supreme Court applied harmless error to *Blakely* error.[4] Recuenco was charged with "intentiona[l] assault . . . with a deadly weapon, to wit: a handgun." *Recuenco* at 215. The special verdict form failed to require the jury to find Recuenco had engaged in assault with a "firearm," as opposed to any other kind of "deadly weapon." *Id.* On appeal, the state court vacated Recuenco's sentence, concluding *Blakely* error can never be harmless. *Id.* Reversing the state court, this Court concluded:

> The only difference between this case and *Neder* is that in *Neder*, the prosecution failed to prove the element of materiality to the jury beyond a reasonable doubt, while here the prosecution failed to prove the sentencing factor of 'armed with a firearm' to the jury beyond a reasonable doubt. Assigning this

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[4] *Blakely v. Washington*, 542 U.S. 296, 303 (2004), is another progeny of *Apprendi*, in which this Court clarified, "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant."

> distinction constitutional significance cannot be reconciled with our recognition in *Apprendi* that elements and sentencing factors must be treated the same for Sixth Amendment purposes.

Id. at 220. In other words, "[f]ailure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural error." *Id.* at 222.

Finally, in *Hedgpeth v. Pulido*, ___ U.S. ___, 129 S.Ct. 530 (2008), this Court continued to limit the structural error doctrine by concluding it did not apply when a jury returns a general verdict after being instructed on both a valid and invalid theory. The Court reasoned, "An instructional error arising in the context of multiple theories of guilt, no more vitiates *all* the jury's findings than does omission or misstatement of an element of the offense when only one theory is submitted." *Id.* at 532 (emphasis in original).

This Court's precedents establish harmless error analysis is appropriate even if the trial court omitted an element of the crime from a jury instruction or charging document. It is also clear that the broader language from *Sullivan*, which was relied upon by the Idaho Supreme Court, App. at 78-79, suggesting that any gap in the jury instructions could not be filled by harmless error analysis, has been limited by *Neder* and its progeny, particularly *Mitchell* and *Recuenco*.

It follows that the error in this case – failure to instruct the jury regarding the multiple murder

aggravator contained in I.C. § 19-2515(h)(2) (2000) – should be subject to harmless error analysis. The multiple murder aggravator is a sentencing enhancement, not an element of the crime of murder; *Ring* did not create new criminal offenses. *Porter v. State*, 102 P.3d 1099, 1103 (Idaho 2004). Admittedly, as with virtually all sentencing enhancements, the multiple murder aggravator is the "functional equivalent" of an element for purposes of the Sixth Amendment. *Ring*, 536 U.S. at 609. However, statutory aggravating factors in death penalty cases should not be of greater significance than the elements of the actual crime, particularly in light of Justice O'Connor's conclusion that "many of these challenges will ultimately be unsuccessful, either because the prisoners will be unable to satisfy the standards of harmless error or plain error review. . . ." *Ring*, 536 U.S. at 621 (O'Connor, J., dissenting); *see also Mitchell*, 540 U.S. at 17 (citing cases) ("a number of our harmless-error cases have involved capital defendants"). Failing to instruct on a sentencing enhancement, such as the multiple murder aggravator, no more vitiates the entire jury trial than does omitting an element of first-degree murder. Therefore, it would be illogical to permit harmless error analysis involving the element of a crime, but prohibit such analysis as to a missing sentencing factor even in a capital case.

The Idaho Supreme Court has not "properly interpreted, applied, or extended [*Neder* and its progeny] in a given situation." R. Stern, E. Gressman,

S. Shapiro & K. Geller, *Supreme Court Practice*, at 273(j). Review should be granted to correct this conflict between this Court's precedents and the erroneous interpretation of the federal Constitution by the Idaho Supreme Court. Supreme Court Rule 10(c).

B. Conflict With The Circuit Courts Of Appeals

Every federal circuit to address the question has now rejected the contention that sentencing errors are structural errors not subject to harmless error analysis. Admittedly, few federal courts have addressed the explicit question of whether *Ring* error is subject to harmless error analysis. In *United States v. Allen*, 406 F.3d 940, 943 (8th Cir. 2005), the court examined whether the government's failure to prove at least one statutory aggravator before the grand jury and charge the aggravator in the indictment was error under *Ring* and the Fifth Amendment. Relying upon several Supreme Court cases, the court concluded a Fifth Amendment violation under *Ring* should be analyzed in the same manner as a Sixth Amendment violation, and reasoned that any defects as a result of a *Ring* violation are not structural. *Id.* at 944-45.

Initially, the Ninth Circuit determined *Ring* error is structural and could not be reviewed for harmless error. *Summerlin v. Stewart*, 341 F.3d 1082, 1119 (9th Cir. 2003) ("Given *Ring's* declaration that a defendant is entitled under the Sixth Amendment to a jury

verdict in the penalty phase of a capital case, the substitution of a non-jury verdict cannot be subject to harmless-error analysis"). Not only did the Ninth Circuit's conclusion conflict with *Mitchell* and *Recuenco*, *Summerlin* was reversed by this Court in *Schriro v. Summerlin*, 542 U.S. 348 (2004). Moreover, the Ninth Circuit's decision regarding harmless error was based exclusively upon the Sixth Circuit's decision in *Esparza v. Mitchell*, 310 F.3d 414 (6th Cir. 2002), which was likewise reversed by this Court in *Mitchell v. Esparza*, 540 U.S. 12 (2004). Finally, even the Ninth Circuit has now recognized, based upon *Recuenco*, "*Apprendi* errors are reviewed under the harmless error standard as applied in *Neder*." *United States v. Zepeda-Martinez*, 470 F.3d 909, 913 (9th Cir. 2006). *Zepeda-Martinez* has been applied in the context of a death penalty case. *Lewis v. Woodford*, 2007 WL 196635, *58 (E.D. Cal. 2007).

In *Murdaugh v. Ryan*, 2010 WL 3523070, *48-49 (D. Ariz. 2010), the court discussed *Neder*, and recognized the Supreme Court has never concluded "*Ring* error is included in that limited class of cases" that fall under structural error. In *Jackson v. Carroll*, 2004 WL 1192650, *26 (D. Del. 2004), the court concluded, "Unlike a defect such as the complete deprivation of counsel or trial before a biased judge, a *Ring* error does not affect the framework within which the trial proceeds, but rather only the trial process itself." In *Ryan v. Clarke*, 287 F.Supp.2d 1008, 1014 (D. Neb. 2003), the court applied harmless error to *Ring*, concluding, "beyond all reasonable doubt any

such error would be harmless because no reasonable jury could come to factual conclusions different than those found by Judge Finn regarding aggravating circumstances."

While few federal courts have addressed the explicit question of whether *Ring* is subject to harmless error analysis, every circuit has concluded that *Apprendi* and its progeny are subject to harmless error analysis. For example, in *United States v. Colan-Nales*, 464 F.3d 21, 27 (1st Cir. 2006), the First Circuit, relying upon its own precedent and several Supreme Court cases, including *Neder*, and *Recuenco*, concluded judicial fact-finding of a sentencing enhancement "is not a structural error which obviates the requirement that defendant demonstrate prejudice" for purposes of the plain error doctrine under F.R.C.P. 52(b). *See also United States v. Antonakopoulos*, 399 F.3d 68, 80 n.11 (1st Cir. 2005) (plain error case); *United States v. Perez-Ruiz*, 353 F.3d 1, 17 (1st Cir. 2003) ("failure to submit appropriate drug type and quantity questions to the jury does not constitute structural error" under *Apprendi*) (citing cases).

Relying upon *Recuenco*, the Second Circuit, in a federal habeas case, concluded *Blakeley* error "is not structural error and is subject to harmless error analysis" and remanded for a determination of whether the sentencing error was harmless under the federal habeas harmless error standard in *Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993). *Besser v. Walsh*, 601 F.3d 163, 188 (2nd Cir. 2010); *see also*

United States v. Friedman, 300 F.3d 111, 127-28 (2nd Cir. 2002) (holding *Apprendi* error harmless).

In *United States v. Vasquez*, 271 F.3d 93, 102-03 (3rd Cir. 2001), the Third Circuit rejected the contention that *Apprendi* error constitutes a structural defect, concluding there is no difference between an instruction that omits an element of the offense at trial and sentencing error when the judge, rather than the jury, determined the drug quantity for purposes of a sentencing enhancement.

Addressing the question of harmless error stemming from a sentencing violation under *United States v. Booker*, 543 U.S. 220 (2005) – which decided *Apprendi* and its progeny applied to the federal mandatory sentencing guidelines – the Fourth Circuit "decline[d] to classify the error of sentencing a defendant under the pre-*Booker* mandatory regime as a structural error" and reaffirmed that "*Apprendi* error itself is not structural." *United States v. White*, 405 F.3d 208, 222 (4th Cir. 2005).

In *United States v. Matthews*, 312 F.3d 652, 665 (5th Cir. 2002), the Fifth Circuit extended this Court's holding in *Neder*, reasoning, "*Apprendi* error is susceptible to harmless error analysis." *See also United States v. Baptiste*, 309 F.3d 274, 277 (5th Cir. 2002) (quoting *United States v. Anderson*, 289 F.3d 1321, 1323-25 (11th Cir. 2002)) ("*Apprendi* errors are subject to harmless error analysis because they 'do not fall within the limited class of fundamental

constitutional errors that defy analysis by harmless error standards' ").

Likewise, the Sixth Circuit has concluded, "*Apprendi* errors are considered to be trial-type errors subject to harmless-error review." *Campbell v. United States*, 364 F.3d 727, 737 (6th Cir. 2004); *see also Villagarcia v. Warden, Noble Corr. Inst.*, 599 F.3d 529, 536-37 (6th Cir. 2010) (applying *Brecht* harmless error standard to a *Blakely* and *Apprendi* claim in a federal habeas case).

In *United States v. Mansoori*, 480 F.3d 514, 523 (7th Cir. 2007), the Seventh Circuit addressed *Apprendi* error and explained, "the lack of a jury finding as to drug quantity does not preclude a reviewing court from concluding that the evidence of the requisite quantity was so strong as to leave no doubt as to what the jury's finding on that subject would have been." *See also Knox v. United States*, 400 F.3d 519, 523 (7th Cir. 2005) (citing *Summerlin*, 542 U.S. at 356) (*Apprendi* error is subject to harmless error analysis because "juries are not necessarily more accurate than judges at finding facts").

In another drug case, the Eighth Circuit examined the indictment and concluded, "In finding defendant guilty on this count, the jury necessarily found the quantity alleged in the indictment. Even if we assume that the jury did not make an express finding of drug quantity, that does not mean that reversal is required, 'because *Apprendi* did not recognize or create a structural error that would require

per se reversal.'" *United States v. McDonald*, 336 F.3d 734, 738 (8th Cir. 2003) (quoting *United States v. Anderson*, 236 F.3d 427, 429 (8th Cir. 2001)).

The Tenth Circuit has also concluded that preserved *Blakely* error is subject to harmless error analysis. *United States v. Corchado*, 427 F.3d 815, 820 (10th Cir. 2005).

The Eleventh Circuit is in accord with the other circuits, concluding that preserved *Blakely/Booker* error can be reviewed for harmless error. *United States v. Dulcio*, 441 F.3d 1269, 1277 (11th Cir. 2006). Likewise, relying upon *Neder*, the circuit determined, "*Apprendi* errors do not fall within the limited class of fundamental constitutional errors that defy analysis by harmless error standards." *United States v. Candelario*, 240 F.3d 1300, 1307 (11th Cir. 2001).

Finally, the D.C. Circuit agrees that post-*Apprendi* error is not structural, but can be reviewed for harmless error. *United States v. Samuel*, 296 F.3d 1169, 1176 (D.C. Cir. 2002).

The Idaho Supreme Court's decision clearly conflicts with every federal circuit and the lower federal courts. Therefore, review is appropriate under Supreme Court Rule 10(b).

C. Conflict With State Appellate Courts

State courts have also examined the express question of whether *Ring* is subject to harmless error analysis. Pursuant to this Court's instruction, *Ring*,

536 U.S. at 609, n.7, the Arizona Supreme Court addressed the question of whether any error was harmless because the statutory aggravating factor was implicit in the jury's verdict. *State v. Ring (Ring III)*, 65 P.3d 915, 934-35 (Ariz. 2003). The Arizona court examined Supreme Court precedent, including *Neder*, and *United States v. Cotton*, 535 U.S. 625, 630-31 (2002), and concluded *Ring* error is not structural, but must be examined for harmless error, reasoning, "Defendants' trials thus took place before an impartial judge and jury, who used the correct standard of proof. Defendants received the assistance of counsel, who were available during all phases of their prosecution. Any error, then, affected the submission of one element rather than the entire trial and did not render the entire trial fundamentally unfair." *Ring III*, 65 P.3d at 935. The court also noted the overwhelming number of federal circuits that had found the Supreme Court's holding in *Apprendi* is subject to harmless error analysis. *Id.* at 935-36 (citing cases).

The Delaware Supreme Court expressly concluded *Ring* error may be examined for harmlessness. *Brice v. State*, 815 A.2d 314, 324-25 (Del. 2003). Undertaking analysis similar to *Ring III*, the Delaware Supreme Court examined a number of Supreme Court decisions, noted the limited type of cases in which this Court has concluded harmless error cannot be applied and concluded this Court employs structural error analysis "only when reviewing constitutional errors that occurred during the

guilt/innocence phase of the trial." *Brice*, 915 A.2d at 324-25. Moreover, the court recognized *Ring* itself does not support the conclusion that such error is structural. *Id.* at 325. After completing its analysis, the court concluded capital sentences do not suffer from the same constitutional defect as those cases in which the Supreme Court has found structural error, explaining, "First, defendants sentenced under Delaware's 1991 scheme were not denied a jury verdict of guilty beyond a reasonable doubt. Second, the advisory jury made specific numerical findings as to the existence of statutory aggravating circumstances." *Id.* at 326; *see also Cauthern v. State*, 145 S.W.3d 571, 623 (Tenn. Ct. App. 2004) ("We detect no indication in *Ring* that the Supreme Court was jettisoning appellate review predicated on a harmless-error analysis").

Even more states have concluded *Apprendi* is subject to harmless error analysis. *See, e.g., State v. Fichera*, 2010 WL 3618689, *2 (N.H. 2010) ("An *Apprendi* violation concerning an omission from an indictment may constitute harmless error where the evidence is overwhelming [sic] that the grand jury would have found the fact at issue"); *State v. Garza*, 236 P.3d 501, 509-10 (Kan. 2010) ("we are convinced the *Apprendi*-type error that occurred in Garza's case, *i.e.*, when the trial court made the age determination rather than having the jury make the actual finding, was harmless"); *State v. Gibson*, 38 So.3d 373, 381 (La. 2010) ("Even though the trial court clearly committed an *Apprendi* violation, we conclude that the error was harmless"); *State v. Payan*, 765 N.W.2d 192,

204 (Neb. 2009) (relying upon *Recuenco*, to conclude that *Apprendi/Blakely* error is not structural); *Brown v. State*, 995 So.2d 698, 704 (Miss. 2008) ("*Apprendi* errors are not structural in nature and will not be reversed if the error was harmless"); *Galindez v. State*, 955 So.2d 517, 522-23 (Fla. 2007) ("to the extent some of our pre-*Apprendi* decisions may suggest that the failure to submit factual issues to the jury is not subject to harmless error analysis, *Recuenco* has superseded them"); *Adams v. State*, 153 P.3d 601, 612 (Mont. 2007) ("*Apprendi* error is subject to harmless error review"); *State v. Fagan*, 905 A.2d 1101, 1121 (Conn. 2006) ("even if the defendant were entitled under *Apprendi* to a jury trial on this issue . . . the failure to submit this factor to a jury necessarily would be harmless error"); *State v. Schofield*, 895 A.2d 927, 936 (Me. 2005) ("a violation of the jury determination required by *Apprendi* was *not* structural error requiring reversal") (emphasis in original).

Given the conflicting decisions from the state courts of last resort regarding the question of whether *Apprendi*, *Ring*, and their progeny can be reviewed for harmless error, and the lack of any viable reason to distinguish *Apprendi*, *Ring* or their progeny from the question of whether *Ring* can be reviewed for harmless error, review by this Court is appropriate under Supreme Court Rule 10(b).

D. The Idaho Supreme Court's Erroneous Interpretation Of The Federal Constitution Creates A Continuing Analytical Difficulty

For years, numerous states, including Idaho, relied upon the belief that statutory aggravating factors in capital cases could be decided by a judge. This belief was confirmed by this Court in 1990 in *Walton*, 497 U.S. at 647-49, and reaffirmed ten years later in *Apprendi*, 530 U.S. at 496-97, prior to Shackelford murdering Donna and Fred. Not until after Shackelford was sentenced and commenced post-conviction proceedings was *Ring* decided. In *Ring*, this Court declined to address Arizona's assertion that any error was harmless because the statutory aggravating factor was implicit in the jury's verdict since the question of harmlessness must first be addressed by the lower courts. 536 U.S. at 609 n.7. The courts have wrestled with this Court's unanswered question regarding whether *Ring* error can be reviewed for harmlessness. Because of the length of time associated with reviewing death penalty cases, this question will continue not only in Idaho, but other states, particularly the five states that employed exclusively judge sentencing prior to *Ring*, the four states that use "hybrid systems," *see Ring*, 536 U.S. at 608 n.6, and the federal courts when reviewing habeas cases.

More importantly, this unanswered question will not abate over a short period of time merely because some states have enacted new legislation requiring

juries to find statutory aggravating factors. Rather, under *Shackelford*, Idaho and any jurisdiction following its reasoning will be precluded by the Idaho Supreme Court's interpretation of the federal Constitution from conducting harmless error analysis if **any** mistake is made in instructing the jury regarding the respective sentencing enhancement. This continuing problem will perpetuate the inconsistent results stemming from *Shackelford*, whereby harmless error is possible where an element of a crime is completely omitted, but impossible if a sentencing factor (statutory aggravating factor) is omitted or merely incorrectly defined.

E. Based Upon The Jury's Verdicts, Evidence Presented At Trial, And Shackelford's Failure To Dispute The Aggravator, The State Met Its Burden Of Establishing Any Alleged Error Resulting From Not Instructing The Jury Regarding The Multiple Murder Aggravator Was Harmless

Whether couched in terms of harmless error or that the jury's verdicts established the multiple murder aggravator as to both Donna and Fred, the state met its burden of establishing any error from the jury's alleged failure to "explicitly" find the multiple murder aggravator or the failure to instruct regarding the aggravator was harmless.

As explained above, in addressing harmless error when an instruction regarding the elements has been

omitted, the question is "whether the record contains evidence that would rationally lead to a contrary finding with respect to the omitted element. If the answer to that question is 'no,' holding the error harmless does not 'reflec[t] a denigration of the constitutional rights involved.'" *Neder*, 527 U.S. at 19 (quoting *Rose*, 478 U.S. at 577).

In addressing the failure to instruct a jury regarding a statutory aggravator, a number of courts have concluded the jury's verdicts at the guilt phase of a trial can establish the jury found a defendant guilty of a statutory aggravating factor. For example, in *Turner v. State*, 924 So.2d 737, 785 (Ala. Crim. App. 2002), the state court examined the evidence presented at the trial and the jury's verdicts, concluding, "the jury's verdict finding Turner guilty of two counts of capital murder – murder during a rape and murder during a robbery – also established that a jury had found two aggravating circumstances." Similarly, in *Tomlin v. State*, 909 So.2d 213, 281-82 (Ala. Crim. App. 2002), *rev'd on other grounds*, *Ex parte Tomlin*, 909 So.2d 283 (Ala. 2003), the court reasoned, "Tomlin was convicted of the capital offense of killing two or more people during one course of conduct. . . . Therefore, the jury's verdict in the guilt phase established the aggravating circumstance that made Tomlin eligible for death under Alabama law. There was no *Ring* violation here." *Accord Irvin v. State*, 940 So.2d 331, 365 (Ala. Crim. App. 2005) ("the jury unanimously found Irvin guilty of murdering Jackie Thompson during the commission of

first-degree robbery, making him eligible for the death penalty. Thus, *Ring* was satisfied").

Likewise, in *Belcher v. State*, 851 So.2d 678, 685 (Fla. 2003), the defendant raised several *Ring* challenges, which the court rejected, concluding, "Regarding the murder being committed in the course of a sexual battery aggravator, the fact remains that a unanimous jury found Belcher guilty of both murder and sexual battery, and therefore the guilt phase verdicts reflect that the jury independently found the aggravator of the murder being committed in the course of a sexual battery." *Id.*

In *Williams v. State*, 793 N.E.2d 1019, 1028 (Ind. 2003), the defendant contended the jury did not find a statutory aggravating circumstance as required under *Ring*. Declining to address the retroactivity of *Ring*, the Indiana Supreme Court concluded, "The guilt phase verdict necessarily shows that the jury unanimously found that Williams had committed two murders, and thus, shows that the multiple-aggravating circumstance was proved beyond a reasonable doubt." *Id.* at 1028-29 (citing cases). *See also Holmes v. State*, 820 N.E.2d 136, 139 (Ind. 2005) ("The jury returned a verdict in the guilt phase of the trial finding Holmes guilty of two intentional murders and robbery. [Citation omitted]. This unanimous verdict in the guilt phase necessarily establishes that the jury found, beyond a reasonable doubt, aggravating circumstances rendering Holmes eligible for the death penalty").

Beginning with *Brice*, 815 A.2d at 323, Delaware has also concluded a jury's guilt phase verdicts can result in the finding of a statutory aggravating factor. *See also Swan v. State*, 820 A.2d 342, 359 (Del. 2003) (finding the jury found a statutory aggravator based upon its verdicts finding the defendant guilty of two counts of felony murder); *Norcross v. State*, 816 A.2d 757, 767 (Del. 2003) (same). This general principle was expressly applied to a multiple murder aggravator in *Reyes v. State*, 819 A.2d 305, 316-17 (Del. 2003), with the court explaining, "The jury convicted Reyes of, among other crimes, two counts of Murder in the First Degree under Section 636(a)(1). Multiple convictions under Section 636(a)(1), resulting from a single course of conduct, establish the existence of a statutory aggravator under Section 4209(e)(1)(k)." The court concluded, "When the very nature of a jury's guilty verdict simultaneously establishes the statutory aggravating circumstance set forth under Section 4209(e)(1)(k), that jury verdict authorizes a maximum punishment of death in a manner that comports with the United States Supreme Court's holding in *Ring*." *Id.* at 17. *Accord Starling v. State*, 882 A.2d 747, 758 (Del. 2005); *see also Jones v. United States*, 828 A.2d 169, 180 (D.C. 2003) (affirming a life sentence statutory aggravator because "the murder verdict itself established the aggravating factor beyond a reasonable doubt").

Admittedly, in *Ring III*, the court concluded the jury's verdicts alone did not establish the aggravator because there was not a finding "that the murders are

temporally, spatially and motivationally related." 65 P.3d at 941. However, the court explained it would still consider harmless error "in those cases in which no reasonable jury could find that the state failed to prove the [multiple murder] factor beyond a reasonable doubt." *Id.* at 942.

The federal courts have also concluded harmlessness need not be based exclusively upon the jury's verdicts. Relying upon *Neder*, the Eleventh Circuit not only found *Apprendi* error is not structural, but also concluded the evidence at the trial must be considered in determining whether the error is harmless, reasoning, "we must affirm the appellants' sentences unless we find that 'the record contains evidence that could rationally lead to a contrary finding with respect to the omitted evidence.'" *Anderson*, 236 F.3d at 429 (quoting *Neder*, 527 U.S. at 19); *see also McDonald*, 336 F.3d at 738 ("Under these facts, the failure to get a special verdict from the jury with an explicit finding of quantity did not impugn the integrity or raise doubt about the fairness of these proceedings"). The Ninth Circuit has concluded that the evidence presented at trial can be used in determining whether *Apprendi* error is harmless. *United States v. Smith*, 282 F.3d 758, 771-72 (9th Cir. 2002); *accord United States v. Hollis*, 490 F.3d 1149, 1156-57 (9th Cir. 2007). While these cases involve *Apprendi* error, there is simply no basis for concluding the evidence presented at trial cannot be considered in determining whether *Ring* error is harmless. *See Ryan*, 287 F.Supp.2d at 1014 ("beyond all reasonable

doubt any such error would be harmless because no reasonable jury could come to factual conclusions different than those found by Judge Finn regarding aggravating circumstances").

Based not only upon the jury's verdicts, but also the evidence presented at trial, any error associated with the jury not being instructed regarding the multiple murder aggravator was harmless. Dr. Cihak determined Fred's time of death was a half hour to three hours after eating food consistent with what he ate at the Cherry Locust Festival. (Tr., pp.2209-11, 2237.) Admittedly, because Donna's stomach was destroyed in the fire, Dr. Cihak could not determine the exact time of Donna's death. (Tr., p.2236.) However, Dr. Cihak was able to conclude both died from bullet wounds with their bodies subsequently being burned in the house fire. (Tr., pp.2192, 2195-96, 2208, 2215-16.) At approximately 11:30 a.m. Ted Meske, who was working on a fence line, saw a red Bronco, usually driven by Shackelford and Sonja Abitz, returning home. (Tr., pp.1098-1105.) An hour later, Meske saw the Bronco leaving "noticeably faster." (Tr., p.1108.) During the hour between the Bronco's return and subsequent departure, Meske heard multiple gunshots. (Tr., pp.1110-14.) Ballistics testing revealed the same gun was used to murder Donna and Fred. (Tr., pp.2477-78.) It was during that hour, after the Bronco returned to the house and subsequently left, that Shackelford murdered Donna and Fred.

Based not only upon this evidence, but all of the evidence presented at trial, coupled with the jury's verdicts finding Shackelford guilty of both Donna and Fred's murders, the record does not contain evidence that would rationally lead to a contrary finding with respect to the multiple murder aggravator. *See Neder*, 527 U.S. at 19. More importantly, Shackelford never questioned whether Donna and Fred were murdered at the same time, but based his defense upon the contention that he was not the murderer. Therefore, any alleged error based upon *Ring* was harmless.

CONCLUSION

Petitioner respectfully requests that a writ of certiorari be granted and the judgment of the Idaho Supreme Court be summarily reversed.

Respectfully submitted,

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IN THE SUPREME COURT
OF THE STATE OF IDAHO
Docket No. 27966/31928

STATE OF IDAHO,	**Boise, August 2009 Term**
Plaintiff-Respondent-Cross Appellant,	**2010 Opinion No. 59**
	Filed: June 1, 2010
v.	**Stephen W. Kenyon, Clerk**
DALE CARTER SHACKELFORD,	**SUBSTITUTE OPINION.**
Defendant-Appellant-Cross Respondent.	**THE COURT'S PRIOR OPINION DATED JANUARY 20, 2010, IS HEREBY WITHDRAWN.**

Appeal from the District Court of the Second Judicial District, State of Idaho, Latah County. Hon. John R. Stegner, District Judge.

Judgment of conviction for first-degree murder, conspiracy to commit first-degree murder, first-degree arson, conspiracy to commit first-degree arson and preparing false evidence, *affirmed*. Case *remanded* for resentencing.

Griffard Law Offices, Boise, for appellant. Leo N. Griffard, Jr., argued.

Hon. Lawrence G. Wasden, Attorney General, Boise, for appellant. L. Lamont Anderson argued.

BURDICK, Justice

Dale Carter Shackelford appeals from his judgment of conviction, based upon jury verdicts finding him guilty of the first-degree murders of Donna Fontaine and Fred Palahniuk, conspiracy to commit first-degree murder, first-degree arson, conspiracy to commit first-degree arson, and preparing false evidence. He also appeals from his sentences of death for first-degree murder, as well as the partial denial of his claims for post-conviction relief. The State cross-appeals, challenging the district court's grant of post-conviction relief, which set aside Shackelford's death sentences and requires resentencing. We find that any error committed by the district court was harmless, and we therefore affirm on all issues. We affirm the district court's order for resentencing on different grounds.

I. FACTUAL AND PROCEDURAL BACKGROUND

Dale Shackelford was convicted of the murders of his ex-wife, Donna Fontaine, and her boyfriend, Fred Palahniuk, which occurred near the Latah County town of Kendrick, Idaho, in May 1999. The State alleged that Shackelford conspired with Martha Millar, Bernadette Lasater, Mary Abitz, Sonja Abitz, and, John Abitz.[1] Millar and Lasater worked for

[1] The charges against John Abitz were eventually dismissed.

Shackelford's trucking business, Shackelford Enterprises, in Missouri. The Abitz family lived near the residence where the bodies of Donna and Fred were found. Sonja Abitz was Shackelford's fiancée at the time of the murders, and John and Mary Abitz are Sonja's parents. The alleged conspirators eventually pled guilty to charges related to the murders.

Shackelford and Donna married in Missouri in December 1995 and the relationship ended in the summer of 1997, with the couple divorcing in November of that year. Donna accused Shackelford of raping her in July 1997, and charges were filed in 1998. In the spring of 1999, Donna developed a relationship with Fred and, on May 28, 1999, the two visited Donna's brother, Gary Fontaine, at the home Gary and Donna's daughter owned together outside of Kendrick. The morning of May 29, Donna, Fred, and Gary went to the Locust Blossom Festival in Kendrick, where they met John, Mary, and Sonja Abitz.

After leaving the festival, Gary went to the Abitz's house, but he left around dark, returned home, noticed Donna's pickup in the driveway, and smelled smoke. Gary called the Abitz's house and reported that his two-story garage was on fire. Mary, Sonja, Ted Meske (Mary's brother), and Shackelford arrived at the fire and various individuals tried to extinguish it, but were unsuccessful.

At 7:40 p.m., Latah County Sheriff Patrol Deputy Richard Skiles was called to investigate the fire at

2168 Three Bear Road. When Skiles arrived at the scene, nearly an hour later, he observed several persons – including Gary Fontaine, Mary Abitz, Sonja Abitz, Brian Abitz (Sonja's brother), Ted Meske, and Shackelford – standing near the garage that was completely engulfed in flames. Based upon information obtained from Ted and Shackelford, Deputy Skiles contacted dispatch to have an on-call detective sent "because there was a possibility there could be a suicide victim in the fire." By the time the fire department arrived, the garage had been utterly destroyed. Several hours later, after the fire had been extinguished, two bodies were found in the rubble. The bodies were subsequently identified as the remains of Donna and Fred. At trial, a state fire investigator testified as to his opinion that the fire was arson.

Doctor Robert Cihak conducted autopsies of the remains, which were severely burned. Shotgun pellets were found in Donna's right chest region and a bullet was found in the back of her neck. Dr. Cihak opined that the bullet wound was fatal and was inflicted when Donna was still alive. A bullet was also found in Fred's body behind the upper breastbone, which Dr. Cihak concluded was the cause of death. Dr. Cihak offered his opinion that Donna and Fred were dead at the time of the fire.

Shackelford was indicted on February 11, 2000, and charged with two counts of first-degree murder, first-degree arson, conspiracy to commit first-degree murder, conspiracy to commit arson, and preparing

false evidence. Trial began on October 16, 2000, and concluded December 22, 2000. The jury returned guilty verdicts on all counts charged in the Indictment. Sentencing commenced on August 27, 2001, and, on October 25, 2001, the district court read its Findings of the Court in Considering Death Penalty. As to Donna's murder, the court found that the State had proven beyond a reasonable doubt two statutory aggravating factors: I.C. § 19-2515(h)(2) (2000) and I.C. § 19-2515(h)(10) (2000).[2] As to Fred's murder, the court found the statutory aggravating factor under I.C. § 19-2515(h)(2) (2000). After weighing the mitigating factors against the individual statutory aggravating factors, the court concluded that the mitigating factors were not sufficiently compelling to render the death penalty unjust, and sentenced Shackelford to death for both first-degree murders. Shackelford was also given prison sentences for the other felony offenses. The judgment of conviction was filed November 1, 2001. Shackelford appeals from his convictions.

On April 8, 2005, the district court addressed the parties' motions for summary disposition regarding Shackelford's petitions for post-conviction relief. The court granted Shackelford sentencing relief, concluding that *Ring v. Arizona,* 536 U.S. 584 (2002), mandated that the jury conduct the weighing of

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[2] The statutes are currently codified at I.C. §§ 19-2515(9)(b) and (9)(k) and consist of identical language.

aggravating and mitigating factors. The court therefore ordered that Shackelford's death sentences be set aside. The court then rejected Shackelford's other *Ring* claim that the jury must find any aggravating factors, concluding that the jury's verdict established that Shackelford murdered Donna and Fred at the same location and date, thereby establishing the multiple-murder aggravator pursuant to I.C. § 19-2515(h)(2) (2000). The district court concluded that three of Shackelford's other post-conviction claims were moot based upon the court's decision to provide Shackelford with sentencing relief. All of Shackelford's remaining claims were denied. Shackelford's notice of appeal and the State's notice of cross-appeal were timely filed.

II. ANALYSIS

Shackelford raises numerous issues in his brief, asserting errors during both the guilt and sentencing phases of his trial. Additionally, the State cross-appeals the district court's decision setting aside Shackelford's death sentences. We will first address Shackelford's claims as to the guilt phase of his trial, and will then turn to the arguments presented regarding sentencing.

A. Guilt Phase

1. Evidentiary Issues

Shackelford contends that the district court erred in admitting into evidence out-of-court statements

made by Donna Fontaine, Sonja Abitz, Mary Abitz, and Robin Eckmann.

a. Standard of Review

This Court reviews questions regarding the admissibility of evidence using a mixed standard of review. *State v. Stevens,* 146 Idaho 139, 143, 191 P.3d 217, 221 (2008). First, whether the evidence is relevant is a matter of law that is subject to free review. *State v. Field,* 144 Idaho 559, 569, 165 P.3d 273, 283 (2007). Second, we review the district court's determination of whether the probative value of the evidence outweighs its prejudicial effect for an abuse of discretion. *Stevens,* 146 Idaho at 143, 191 P.3d at 221. We determine whether the district court abused its discretion by examining: (1) whether the court correctly perceived the issue as one of discretion; (2) whether the court acted within the outer boundaries of its discretion and consistently within the applicable legal standards; and (3) whether the court reached its decision by an exercise of reason. *Id.* However, an abuse of discretion may be deemed harmless if a substantial right is not affected. *State v. Thompson,* 132 Idaho 628, 636, 977 P.2d 890, 898 (1999). "In the case of an incorrect ruling regarding evidence, this Court will grant relief on appeal only if the error affects a substantial right of one of the parties." *Obendorf v. Terra Hug Spray Co.,* 145 Idaho 892, 897, 188 P.3d 834, 839 (2008); I.R.E. 103(a). "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." I.C.R. 52.

b. The admission of Donna Fontaine's out-of-court statements was in error, but that error was harmless.

Shackelford first argues that the district court erred in allowing multiple out-of-court statements made by Donna Fontaine to be introduced under Idaho Rule of Evidence 803(3) because (1) Shackelford did not inject the issue of the possibility of suicide into the case; (2) even if he did somehow inject suicide as an issue, the disputed statements bear marginal, if any, relevance to the issue of whether Donna may have been inclined to commit suicide; and (3) the admission of Donna's out-of-court statements expressing her fears of Shackelford was highly prejudicial and the prejudicial effect of such evidence substantially outweighed any probative value.

Conversely, the State maintains that (1) Shackelford's statements drove the initial investigation into whether there may have been a suicide victim in the fire; (2) Donna's state of mind was not only relevant, but "was integral in understanding a significant issue in the case"; and (3) based upon his own statements expressing his desire to kill Donna, the testimony of his co-conspirators, and the forensic evidence, Shackelford has failed to establish a reasonable possibility that the alleged error associated with the admission of testimony regarding Donna's fear contributed to his conviction. We find that the district court abused its discretion in admitting the statements, but the error was harmless.

Six witnesses were allowed to testify as to statements made by Donna expressing her fear that Shackelford was going to harm her. The district court determined that these out-of-court statements were admissible as an exception to the rule against hearsay. Idaho Rule of Evidence 802 states: "Hearsay is not admissible except as provided by these rules or other rules promulgated by the Supreme Court of Idaho." The exception to the hearsay rule under which the district court admitted the evidence in this case is I.R.E. 803(3):

> **Then existing mental, emotional, or physical condition.** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

Limited circumstances exist in which statements made by a murder victim to a third party are admissible under I.R.E. 803(3)'s state of mind exception to the hearsay rule. *State v. Garcia,* 102 Idaho 378, 382, 630 P.2d 665, 669 (1981).[3] The statements may be

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[3] While the Idaho Rules of Evidence were not adopted until 1985, the "state of mind" exception existed under common law rules of evidence used in Idaho in nearly identical form to I.R.E. 803(3); thus, the analysis remains similar. *See Herrick v. Leuzinger,* 127 Idaho 293, 301, 900 P.2d 201, 209 (Ct. App. 1995).

admitted only after a determination that (1) the declaration is relevant, and (2) the need for and value of such testimony outweighs the possibility of prejudice to the defendant. *Id.* The district court erred in finding that the out-of-court statements made by Donna were relevant; therefore, we need not address whether the value of the testimony outweighed the possibility of prejudice to the defendant.

Evidence that is "'relevant to a material and disputed issue concerning the crime charged'" is generally admissible. *State v. Stevens,* 146 Idaho 139, 143, 191 P.3d 217, 221 (2008) (quoting *State v. Field,* 144 Idaho 559, 569, 165 P.3d 273, 283 (2007)). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." I.R.E. 401; *see also Stevens,* 146 Idaho at 143, 191 P.3d at 221. Whether a fact is "of consequence" or material is determined by its relationship to the legal theories presented by the parties. *State v. Yakovac,* 145 Idaho 437, 444, 180 P.3d 476, 483 (2008).

This Court, in *State v. Goodrich,* recognized four well-defined categories in which a declarant-victim's state of mind is relevant because of its relationship to the legal theories presented by the parties: (1) when the defendant claims self-defense as justification for the killing; (2) when the defendant seeks to build his defense around the fact that the deceased committed suicide evidence introduced which tends to demonstrate that the victim made statements inconsistent

with a design to take his or her own life is relevant; (3) when the defendant claims the killing was accidental; and (4) when a specific "mens rea" is in issue. 97 Idaho 472, 477 n.7, 546 P.2d 1180, 1187 n.7 (1976).

In *State v. Garcia,* 102 Idaho 378, 382, 630 P.2d 665, 669 (1981), this Court again referenced the four well-defined categories laid out in *Goodrich,* and also cited to *United States v. Brown,* 490 F.2d 758, 767 (D.C. Cir. 1973), for the D.C. Circuit's further discussion of the first three categories. *Brown* describes the category involving the defense theory of suicide as follows: "[W]here a defendant seeks to defend on the ground that the deceased committed suicide, evidence that the victim had made statements inconsistent with a suicidal bent are highly relevant." 490 F.2d at 767. In *Garcia,* this Court found that the district court had erred in admitting the hearsay testimony of the witness because the defendant's defense had not been based on any of the categories laid out in *Brown* and *Goodrich.* 102 Idaho at 382-83, 630 P.2d at 669-70.

The United States Supreme Court dealt directly with the issue of evidence of a victim's state of mind offered to rebut a defense theory of suicide in *Shepard v. United States,* 290 U.S. 96 (1933). In *Shepard,* the Supreme Court found that the victim's declaration "Dr. Shepard has poisoned me" was neither admissible as a dying declaration (as the State had argued), nor as evidence of the victim's state of mind. *Id.* at 103. The defendant attempted to show that the victim had "exhibited a weariness of life and a readiness to

end it," which gave "plausibility to the hypothesis of suicide." *Id.* The Court stated:

> By the proof of these declarations evincing an unhappy state of mind, the defendant opened the door to the offer by the government of declarations evincing a different state of mind, *declarations consistent with the persistence of a will to live.* The defendant would have no grievance if the testimony in rebuttal had been narrowed to that point. What the government put in evidence, however, was something very different. It did not use the declarations by Mrs. Shepard to prove her present thoughts and feelings, or even her thoughts and feelings in times past. It used the declarations as proof of an act committed by some one else, as evidence that she was dying of poison given by her husband.

Id. at 103-04 (emphasis added).

In the above-mentioned cases, the relevancy of the state of mind statements was shown through the rebuttal of a defense theory. However, in *State v. Radabaugh,* this Court did not expressly condition the admission of state of mind evidence on it being offered to rebut a defense theory. 93 Idaho 727, 471 P.2d 582 (1970). Instead, the Court stated that "[e]vidence tending to show the mental state of the victim and ill-feeling or hostility between decedent and defendant is admissible" and since the statement "I'm scared to death of him" was "probative of the attitudes and feelings (fear) of the victim towards

[defendant], it was properly admitted." *Radabaugh*, 93 Idaho at 731, 471 P.2d at 586. In *State v. Goodrich*, this Court specified that *Radabaugh* had recognized that a state of mind statement may be admissible when the "declarant-victim's state of mind is relevant to an issue involved in the criminal proceedings." 97 Idaho 472, 477, 546 P.2d 1180, 1185 (1976). *Goodrich* then laid out the four categories defined above. Thus, when examining relevancy, we look to whether the fact that the statement was made is relevant to a legal theory presented by the parties.

First, to determine whether the statements here were relevant to rebut a defense theory of suicide, we must determine whether there *was* a defense theory of suicide. The State asserts that Shackelford perpetuated his contention that Donna committed suicide during the course of the investigation and it was his statements that drove the initial investigation. Shackelford argues it was Ted Meske, not him, who first introduced the idea of suicide into the investigation, and Shackelford did not use the theory as a defense at trial.

Shackelford did make statements during the police investigation regarding the possibility that Donna had committed suicide;[4] however, we find that

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[4] Detective Kurtis Hall testified that when he arrived at the scene of the fire, he was told there may have been a suicide victim in the fire:

> [Shackelford] told me that Donna had – had a bad time recently that she had had an election go against

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those statements were not sufficient to allow rebuttal of a defense theory of suicide. The defense did not present a theory of suicide during the trial itself. Instead, the State offered testimony regarding Shackelford's statements during the initial investigation about suicide, and the defense merely offered testimony to show that any mention Shackelford made of suicide during the initial investigation did not affect the investigation in any way. Defense counsel questioned Detective Kurtis Hall who testified that, although police had been informed that there may be a suicide victim in the fire, the investigators treated it as a potential homicide:

> A. At that time I didn't know if we had a body or not, but it's my understanding that any death is treated as a potential homicide until it is established – that we investigate is treated [sic] as a potential

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her, that she was up on fraud charges in Missouri that he had raised for the forgery of a check and that – I can't repeat the exact words, but it was something along the lines of, things are crumbling around her right now, she's having a hard time. . . . He said that he thought it was possible that Donna committed suicide.

Deputy Richard Skiles also testified that Shackelford had mentioned the possibility of there being a suicide victim: "I asked him what he thought the chances of there actually being a possible suicide in the fire and he said that he thought it could be good, but he didn't want to say because he didn't know for sure."

homicide until it is established otherwise.

Q. And did you treat it that way?

A. Yes.

The record here shows that Shackelford's pre-trial comments did not alter any aspect of the criminal investigation. We are not excluding the possibility that a defendant could make statements during a criminal investigation that would create a theory of defense such that the State would find it necessary to offer evidence in their case-in-chief or as rebuttal during trial; however, that has not happened here. Therefore, we hold that the district court erred in allowing the State to introduce Donna's out-of-court statements to show that her state of mind was inconsistent with a defense theory of suicide.

Although we find that the district court erred in admitting the out-of-court statements of Donna, we hold that the error did not affect Shackelford's substantial rights. Whether an error affected substantial rights in a particular case depends upon a host of factors, including the importance of the witness' testimony to the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and the overall strength of the prosecution's case. *State v. Hooper,* 145 Idaho 139, 146, 176 P.3d 911, 918 (2007). In *State v. Garcia,* this Court found that, although the court

erred in admitting hearsay testimony that was not based on any of the categories laid out in *Brown* and *Goodrich*, any inference of guilt from the victim's hearsay statements was outweighed by the defendant's own inculpatory admission made to the witness. 102 Idaho 378, 383, 630 P.2d 665, 670 (1981).

Similarly, in this case, any inference of Shackelford's guilt that may have stemmed from Donna's out-of-court statements was outweighed by testimony regarding Shackelford's own statements expressing his desire to kill Donna, along with the testimony of his co-conspirators and the forensic evidence regarding the murders and the arson. First, several witnesses testified as to statements Shackelford made regarding his desire to kill Donna. Donna's friend, Suzanne Ninichuck, testified as to two conversations she had with Shackelford in the summer of 1997:

> A. [Shackelford] said that Donna was an ugly person and that he was going to destroy her. He was going to destroy her financially, he was going to destroy her professionally. That he was going to destroy her relationships with every friend and every family member and that – he said that she – oh, he said that she had abandoned him up on the mountain.
>
> Q. What mountain?
>
> A. The mountain by their Idaho property. And that she knew that was the worst thing that anybody could do to him was abandon him. And that she deserved –

> she deserved to die. She deserved to be ruined. . . .
>
> He said that he – he loved her very much. He was – but he couldn't live with her. And that she – she was a controlling person, she manipulated people. That – he said he was going to kill her.
>
> . . . .
>
> And that he – at that point in time he said, he could kill her and make it look like an accident. And at that time he was driving a truck and he said he could just – he would – he could find her with the truck and kill her with the truck and he could make it look like an accident. . . .
>
> He said if – he said he loved Donna very passionately and there was no other woman that he would ever love as much as Donna, but he couldn't live with her and if he couldn't live with her nobody would live with her.

James Avery, Donna's son, also testified that in the summer of 1997, he heard Shackelford say on two occasions that if Shackelford caught Donna with another man he would kill them both.[5]

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[5] The first time Avery heard Shackelford make such a statement was in Idaho after Donna and Shackelford had an argument: "My mother and Dale had gotten into another fight. . . . And when I went outside I seen my mom walking down the road and I walked up by Dale and he was rambling. . . . He said similar things such as I don't know what I'm going to do. If I

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In 1998, Shackelford began a relationship with Martha Millar when the two met while working as long-haul truckers. Millar testified that Shackelford convinced her that she should kill Donna for him:

> Q. Ms. Millar, during these months of 1998 when you had this periodic contact with [Shackelford], did he tell you that his ex-wife, Donna, made his life miserable?
>
> A. Yes.
>
> Q. Did he tell you that he had to do away with her?
>
> A. Yes.
>
> Q. How many times did he say that?
>
> A. I would say out of – one out of ten conversations, I would say about six or seven times.
>
> Q. Alright. Did [Shackelford] tell you that you and he could not have a relationship as long as Donna was around?
>
> A. Yes.
>
> . . . .

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catch her with a guy again, I'm going to kill the mother f---ers." Avery also testified that about two weeks after that incident he saw Donna crying on her bed and Shackelford was pacing outside talking to himself: "And he was saying, I don't know what I'm going to do. If I catch with her [sic] another man maybe I should just kill them both."

Q. Alright. Did [Shackelford] express to you what would happen in your relationship if you did away with Donna Fontaine?

A. Yes.

Q. What did he say?

A. He said that I would be his forever.

Q. Alright. The – when [Shackelford] was talking to you about taking care of or doing away with Donna, what was your understanding of what he meant?

A. My understanding was that he wanted to put her six feet under.

Q. Wanted to kill her?

A. Yes.

After these conversations, Millar spoke to a friend and told her she had come up with an idea in response to Shackelford's request to "take care of Donna":

Q. What was your idea?

A. Oh, my idea was to cut her brake lines, dismantle, excuse me, her fuel line and put it near a spark plug so it would burst into flames.

Q. And did you talk to [Shackelford] about that idea?

A. Yes, I did.

Q. Did you and he discuss where he would be when you did this?

A. He would be far, far away.

Q. Why?

A. So that he would have an alibi.

Millar then began working for Shackelford Enterprises in September 1998, and the discussions about killing Donna continued:

Q. Alright. And did [Shackelford] talk to you more in August and September 1998 about Donna Fontaine?

A. Yes.

Q. What did he ask you to do?

A. He asks – he asked me if I could do away with her.

Q. Alright. And did he tell you what would happen if you did?

A. He would get me a lawyer and he would get me off.

. . . .

Q. In early October of 1998, did you have discussions with [Shackelford] about what you should do in Missouri with regard to Donna?

A. Yes.

Q. And what did he ask you to do?

A. He asked me to shoot her.

. . . .

Q. Can you tell us, as best you can recall, what [Shackelford] said to you during that conversation?

A. [Shackelford] told me that I should take my gun, put it in my fanny pack, go down to the courthouse, go directly up to her and shoot her. Empty my gun into her and just stand there like a crazy person.

Q. What did he tell you would happen after you stood there like a crazy person?

A. Well, the cop – the police were going to tackle me and I would get off on an insanity plea, which he would pay for the defense.

Q. When he told her to shoot her, did he use an analogy?

A. Shoot her like a dog.

Q. So then what happened on Monday, October 5th, 1998?

A. I asked Helen to drop me off in town. . . . She dropped me off by the courthouse, I walked up past Donna's office on the opposite side. I crossed the street and she came walking out of her office.

Q. Were you wearing your fanny pack?

A. Oh, yes.

Q. What was in it?

A. My gun.

. . . .

Q. Alright. What happened when she came out of her office?

A. She went to the courthouse. She went into the courthouse, she came back out. She went over to the post office. I followed her to the post office. She came out of the post office and I walked right past her, fanny pack opened, hand on the gun getting ready to pull it out and shoot her, walked right past her.

Q. Why?

A. Because I couldn't do it.

Millar further testified that in April 1999 Shackelford made a bomb to be used in another attempt on Donna's life:

Q. . . . When [Shackelford] talked to you on the telephone in April of 1999 about having made a bomb, what did he tell you?

A. He had told me that he had made a bomb and that he had asked Bernadette Lasater to take the bomb to the Caldonia, Missouri laundromat and she was to blow Donna.

Q. . . . did he tell you whether it worked or not?

A. He told me it had not.

The conversations between Millar and Shackelford regarding killing Donna continued:

Q. Alright. During the spring months of 1999, did [Shackelford] make any requests of you in regard to having anyone else kill Donna?

A. Yes.

. . . .

Q. What did he ask you?

A. He asked me if I knew anybody on the east coast, Connecticut to be exact, that's where I used to live, who would come out to Missouri and do away with Donna.

Q. What did you tell him?

A. I told him that I would think about it and that all my phone numbers were back at the office.

Finally, before Shackelford left for Idaho in late May 1999, Millar testified that he stated: "I'm going to Idaho and do what you couldn't do or what I couldn't get anybody to do."

Bernadette Lasater testified that she met Shackelford in December 1998 and began a romantic relationship with him in February 1999, at which point he also began talking to her about having Donna killed:

Q. As the relationship progressed in March and April of 1999, did [Shackelford] make any statements to you more specifically about – about what he wanted to happen with regard to his ex-wife?

A. He said he would want her to be killed because of – as long as she was alive, she would continually try to control his life. He would never be able to have a happy marriage or be happy, and if she was dead, he can have the happiness that he wanted.

. . . .

Q. Okay. And what did he say?

A. He said in order to prove my love to him that I would have – if I know anybody who would want to kill his wife – his ex-wife Donna.

. . . .

Before I done anything, we had a discussion, Dale and me and Mary Abitz and I believe Marty Millar was present, and there was going to be a preliminary hearing in – for Donna and he wanted her to be disposed of before then.

. . . .

He mentioned if any of us knew of anything that we could do to eliminate Donna and none of us could think of anything. And he came up with the idea of an ambush.

Q. What did he tell you about that?

A. He said there's a huge rock on the way to where Donna's cabin was and he would hide behind this rock with a shotgun and

either I or one of the other women would drive my vehicle since she didn't know it or recognize it, and run her off the road. And after running her off the road into the ditch, he would shoot her.

Q. Did he tell you what he would shoot her with?

A. A shotgun.

In April 1999, Bernadette Lasater attempted to set off an explosive device that Shackelford created, at a laundromat in Missouri where Donna and her daughter were doing their laundry:

Q. Okay. Why did you go to the laundromat?

A. Dale said that Donna would be there.

. . . .

Q. What was your purpose in going to the laundromat?

A. To drop off the explosive and to detonate it.

. . . .

I drove back down into the driveway to the laundromat and pulled up by her truck.

. . . .

I unzipped the backpack, took out the bomb, and connected the detonator, it's a 9-volt battery to the side.

. . . .

Got out of my car, went into the laundromat, sat the explosive on a table next to a washing machine.

Q. Did you see anybody in the laundromat?

A. Yes.

Q. Who was that?

A. It was Donna and later on I found out it was her daughter, Shanna.

. . . .

Q. What did you do then?

A. I left the laundromat, got out – got back in my car, pulled out – started up and backed up a little ways, went down the driveway and stopped and pulled the wire of the remote he wired and pushed the button and nothing happened.

. . . .

Q. So what did you do then?

A. I tried it again and it still didn't happen and I told Dale nothing – I called him on the walkie-talkie and said nothing happened. And he said to go on up to Ken's and turn around and I did and went back to go get the bomb and see if the wires came off or anything was wrong with it.

Q. And did Dale ask you to do that?

A. Yes.

. . . .

Q. And what did you do after it didn't work that [second] time?

A. I called Dale and told him it didn't work and he said don't worry about it, just to go and get it.

A friend of Bernadette Lasater, Bobby Emily, also testified that Shackelford had asked him to kill Donna: "And I told him that I had to do something to make some money. And he says if you want to make some real money, he says, you can get rid of my wife for me." Shackelford also asked Helen Hays, an employee and woman he was having a relationship with, if she would be willing to kill Donna for him:

Q. What did he ask you?

A. He asked me if I would get rid of Donna for him.

Q. Did he offer to give you anything for that?

A. He offered me $5,000 to get rid of her.

. . . .

He asked me if I couldn't do it, if I knew anybody that might do it.

Finally, witnesses testified that Shackelford made comments around the time of the deaths of Donna and Fred indicating that he had committed the murders. PJ Baker, a neighbor to the Abitzes and

friend of Shackelford, testified that the following conversation took place between he and Shackelford on the evening preceding the murders:

> A. [M]y first comment to him was, why are you driving at night with no lights.
>
> Q. What was his response?
>
> A. His response was, I don't want anybody to know I'm here, only Sonja knows.
>
> . . . .
>
> Q. What did he talk about?
>
> A. I just made mention of – I don't know if I said where's Donna or how is Donna or what, but he said – he looked up at the ceiling and said, Donna is no more.
>
> . . . .
>
> Q. Okay. Did he talk to you at all that evening about or use the word alibi?
>
> A. Uh-huh. Yeah, that's right. He came in and wanted an alibi that – for me to say that he had had lunch with Katie and myself.
>
> . . . .
>
> Q. Okay. Now, did he talk anything else that was upsetting?
>
> A. Yes. He said – he asked me the question if I had two bodies to get rid of, how would I do it.

Katherine Baker, PJ Baker's wife, also testified that, on the day of the fire, Shackelford came to their house and asked her what they had for lunch, and then stated "don't worry, you won't be hurt by any of this."

In light of the extensive testimony of the State's witnesses, as well as evidence regarding the times of the deaths, the manner in which the victims were shot, the setting of the fire, and further testimony regarding Shackelford's actions on the day of the deaths, Shackelford has failed to establish beyond a reasonable doubt that the error associated with the admission of testimony regarding Donna's fear would have changed the outcome of the verdict. Therefore, we hold that the error was harmless because Shackelford's substantial rights were not affected.

c. The district court erred in admitting Sonja Abitz's statements, but that error was harmless.

Shackelford next argues that the district court erred in admitting the out-of-court statements made by Sonja Abitz. He contends that the court erred in admitting Sonja's statements to Dorothy Cox because, at the time the statements were made, a conspiracy had not been formed, and because the statements, on their face, were not made in furtherance of the conspiracy. We find that the district court abused its discretion in admitting the testimony regarding Sonja's statements pursuant to I.R.E. 801(d)(2)(E), but that error was harmless.

Idaho Rule of Evidence 801(d)(2)(E) states: "A statement is not hearsay if – the statement is offered against a party and is . . . a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy." "Statements are considered in furtherance of a conspiracy when the statements tend to advance or promote the object of the conspiracy, as opposed to thwarting its purpose." 29 Am.Jur.2d *Evidence* § 856 (2009). The statements "must somehow advance the objectives of the conspiracy, not merely inform the listener of the declarant's activities." *United States v. Snider,* 720 F.2d 985, 992 (8th Cir. 1983). In *State v. Caudill,* this Court held that, where the statements were made after the crime had been committed, the statements were not made in furtherance of the conspiracy because the co-conspirator was not "attempting to further conceal the crime or to obstruct justice." 109 Idaho 222, 226, 706 P.2d 456, 460 (1985).

During the trial, Dorothy Cox testified that Sonja told her "we're going to burn her house down."[6] Judy

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[6] The following questioning of Dorothy Cox took place:

Q. Did she in this period of time that we're talking in the spring of 1999 at the bus garage, did she express her dislike for Donna Fontaine?

A. Yes.

. . . .

Q. Okay. And what did Sonja Abitz say to you about Donna Fontaine?

. . . .

(Continued on following page)

Foster also testified that Sonja stated that "she wished that [Donna] would just leave, that her house would just burn down and she would go back to Missouri." These statements in no way advanced or promoted the object of the conspiracy, nor did they attempt to conceal the crime. Instead, these statements merely informed the listeners that Sonja disliked Donna and wanted to burn her house down so that Donna would leave Idaho. If anything, these statements may have thwarted the purpose of the conspiracy because Sonja was announcing to non-conspirators potentially incriminating evidence. Thus, the district court erred in admitting the out-of-court statements of Sonja Abitz because they were not in furtherance of any conspiracy. However, we find such error to be harmless based upon Shackelford's own statements expressing his desire to kill Donna, the testimony of his co-conspirators, and the forensic evidence concerning the deaths and the arson discussed

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A. She told me she was going to burn her house down.

Q. Okay. Was she angry when she was saying this?

A. Yes.

Q. What was her demeanor?

A. She was angry.

Q. Did she state at that time why her house was going to be burned down by her?

A. No.

Q. Did she – what were the words that you can recall that she said about this?

A. She said we're going to burn her house down.

above. Shackelford failed to establish beyond a reasonable doubt that the error associated with the admission of the testimony regarding Sonja's statements affected the outcome of the verdict.

d. The statements of Mary Abitz and Robin Eckmann were properly admitted.

Shackelford next asserts that the court erred in admitting Mary Abitz's statements to law enforcement officers because the statements were clearly testimonial and thus Shackelford's Sixth Amendment right to confront witnesses against him was violated by their admission. Shackelford also contends that the admission of the statements of Robin Eckmann violated his Sixth Amendment rights. The statements at issue were introduced through the testimony of Sergeant Earl Aston, and revolved around a phone conversation Sergeant Aston had with Mary Abitz while he was at Shackelford's place of business in Missouri.[7] We find that the district court did not

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[7] The following portion of the transcript is relevant to the issues of the admission of the out-of-court statements of both Mary Abitz and Robin Eckmann:

> Q. Detective Aston, during this phone call with Mary Abitz, was she asked about a tape – the tape?
>
> A. Yes, she was.
>
> Q. Okay. And what happens as she's asked about the tape, *what is the defendant's demeanor at that time?*

(Continued on following page)

A. Are we talking about the first tape she was asked about or the second tape?

Q. She's asked about a tape *and what happens to the defendant's demeanor* when she's asked about that?

The Court: I think the witness has asked you to clarify which tape.

Q. It's the tape as she – who asks her about the tape?

A. I'm not sure if it was me or Robin. I believe, it was Robin Eckmann who had asked her about the tape.

Q. Okay. And what – did Robin ask about which particular tape it was?

A. I don't believe at first. I think she was just asked if she had received a tape or was going to be receiving a tape – if she knew she was going to be receiving a tape, I believe was the question.

Q. Okay. And what did – *what did the defendant do at this time?*

Mr. Baker: Your Honor, I'd object on the basis of hearsay as to what Robin Eckmann may have said. There's not going to be, as I understand, a chance to cross examine Ms. Eckmann.

Mr. Christensen: Your Honor, that's just a question, it's not an assertion.

The Court: Overruled.

Q. *What happens to the defendant at this time,* what's his manner?

A. Mary started explaining that she had or that Becky had received a tape. And I noticed that *Mr. Shackelford, to me it appeared, that he was agitated, becoming agitated.* He started rocking back in his chair and drawing – he was smoking a cigarette at the time and drawing hard on a

(Continued on following page)

abuse its discretion in admitting the testimony regarding statements made by Mary and Eckmann because the statements were non-testimonial in nature and the district court instructed the jury that the statements were not offered for the truth of the matter asserted.

When a violation of a constitutional right is asserted, this Court will give deference to the trial court's factual findings unless those findings are clearly erroneous. *State v. Hooper,* 145 Idaho 139, 142, 176 P.3d 911, 914 (2007). However, we exercise free review over the trial court's determination as to whether constitutional requirements have been satisfied in light of the facts found. *Id.* Whether the admission of Mary's and Eckmann's statements violated Shackelford's right to confront witnesses under the Sixth Amendment is a question of law over which the Court exercises free review.

The Confrontation Clause of the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." *Davis v. Washington,* 547 U.S. 813, 821 (2006). Only testimonial statements cause the declarant to be a "witness" within the meaning of the Confrontation Clause. *Id.* The determination of whether evidence is testimonial requires

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> cigarette. It was just a difference in his demeanor at that point and. . . .

(Emphasis added.)

the court to consider the purpose behind the Confrontation Clause. *State v. Hooper,* 145 Idaho 139, 143, 176 P.3d 911, 915 (2007). The Supreme Court based its holding in *Crawford v. Washington,* 541 U.S. 36 (2004), on the historical underpinnings of the Confrontation Clause, and noted that the Sixth Amendment must be interpreted with this history in mind: "First, the principal evil at which the Confro. tation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." *Hooper,* 145 Idaho at 143, 176 P.3d at 915 (quoting *Crawford,* 541 U.S. at 50).

In *Hooper,* this Court analyzed the guidelines set forth by the Supreme Court in *Crawford* in determining what constitutes testimonial statements:

> First, the Court looked to Webster's dictionary definition of "testimony" from 1828. Testimony is "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Crawford,* 541 U.S. at 51, (quoting 1 N. Webster, An American Dictionary of the English Language (1828)). The Court then listed three formulations of "core" testimonial statements:
>
> (1) "*ex parte* in-court testimony or its functional equivalent – that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would

> reasonably expect to be used prosecutorially;"
>
> (2) "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions;" and
>
> (3) "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."
>
> *Crawford,* 541 U.S. at 51-52, (internal citations omitted). This is not an exclusive list of "testimonial" evidence. Rather, these formulations all share a "common nucleus" and then define the Clause's coverage at various levels of abstraction around it. *Id.*

Id. at 142-43, 176 P.3d at 914-15. This Court in *Hooper* then analyzed the factual situations of both *Crawford* and *Davis,* and determined that, under those cases, a statement is testimonial when:

> [T]he circumstances objectively indicate that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution, unless made in the course of police interrogation under circumstances objectively indicating the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.

Id. at 143-44, 176 P.3d at 915-16. This Court also discussed the Supreme Court's focus on the formality of questioning and the extent to which the interview was similar to live testimony. *Id.* at 144-45, 176 P.3d at 916-17. In *Davis,* the Supreme Court stated: "Such statements under official interrogation are an obvious substitute for live testimony, because they do precisely *what a witness does* on direct examination; they are inherently testimonial." 547 U.S. 813, 830 (2006). Taking such factors into account, this Court employs a totality of the circumstances analysis to determine whether statements are testimonial in nature. *Hooper,* 145 Idaho at 145, 176 P.3d at 917.

Looking at the totality of the circumstances here, it is apparent that the statements were non-testimonial in nature. Shackelford told Sergeant Aston that Martha Millar had taped an argument between Shackelford and Bernadette Lasater and mailed the tape to Mary Abitz. Mary then called Shackelford, and he put her on speaker phone in the room he was sitting in with Sergeant Aston. Mary's statements themselves were not offered for the purpose of establishing or proving some fact. Nor was the primary purpose of the questioning to establish or prove past events. Instead, Sergeant Aston's testimony focused on Shackelford's demeanor during the conversation. Therefore, we find that the district court did not err in admitting the out-of-court statements of Mary Abitz.

The district court also overruled defense counsel's objection to the introduction of Robin Eckmann's

out-of-court statements during Sergeant Aston's testimony regarding the conversation with Mary about the tape. We agree with the State that the statements were offered merely to provide context to Mary's answer.

2. Jury instructions

Shackelford argues that the district court erred in giving, or failing to give, certain jury instructions, which served to lessen the State's burden of proof and permitted less than unanimous verdicts. The State contends that, reading the jury instructions as a whole, Shackelford has failed to establish that the instructions given by the district court violated his constitutional rights.

a. Standard of Review

"Whether jury instructions fairly and adequately present the issues and state the applicable law is a question of law over which this Court exercises free review." *State v. Humpherys,* 134 Idaho 657, 659, 8 P.3d 652, 654 (2000). Therefore, the correctness of a jury instruction depends on whether there is evidence at trial to support the instruction. *Craig Johnson Constr., L.L.C. v. Floyd Town Architects, P.A.,* 142 Idaho 797, 800, 134 P.3d 648, 651 (2006). We look at the jury instructions as a whole, not individually, to determine whether the jury was properly and adequately instructed. *Obendorf v. Terra Hug Spray Co.,* 145 Idaho 892, 896, 188 P.3d 834, 838 (2008). An

erroneous instruction will not constitute reversible error unless the instructions as a whole misled the jury or prejudiced a party. *Kuhn v. Proctor,* 141 Idaho 459, 462, 111 P.3d 144, 147 (2005).

b. The district court did not err in refusing to give a *Holder* instruction.

Shackelford first argues that the district court's failure to give a *Holder* instruction to the jury constitutes reversible error because Shackelford should have been allowed an instruction that correctly defined the proper use of circumstantial evidence, as the State's case was based entirely on circumstantial evidence. He contends that the court's refusal to give the jury a *Holder* instruction violated the *Ex Post Facto* and Due Process Clauses of the Idaho and United States Constitutions.[8]

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[8] In *Marks v. United States,* 430 U.S. 188, 191-92 (1977), the United States Supreme Court stated:

> The Ex Post Facto Clause is a limitation upon the powers of the Legislature, and does not of its own force apply to the Judicial Branch of government. But the principle on which the Clause is based the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties is fundamental to our concept of constitutional liberty. As such, that right is protected against judicial action by the Due Process Clause of the Fifth Amendment.

(Citations omitted).

In *State v. Holder*, 100 Idaho 129, 132, 594 P.2d 639, 642 (1979), this Court held that when the prosecution's evidence is entirely circumstantial, the defendant is entitled to a special instruction limiting the effects of the evidence. The instruction that was requested in that case, and that the Court found to be a proper statement of the law was as follows:

> You are not permitted to find the defendant guilty of the crime charged against him based on circumstantial evidence unless the proved circumstances are not only consistent with the theory that the defendant is guilty of the crime, but cannot be reconciled with any other rational conclusion and each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt has been proved beyond a reasonable doubt.

Id. This Court's holding in *Holder* led to the rule that "in cases where guilt is proven by circumstantial evidence, that evidence must be sufficient to exclude every reasonable hypothesis other than the guilt of the defendant." *State v. Humpherys*, 134 Idaho 657, 660, 8 P.3d 652, 655 (2000) (quoting *State v. Randles*, 117 Idaho 344, 350, 787 P.2d 1152, 1158 (1990)). The basis for the Court's holding in *Holder* was the concern that circumstantial evidence was inherently unreliable and could be the basis for convicting an innocent defendant. *Humpherys*, 134 Idaho at 660, 8 P.3d at 655.

However, in *Humpherys,* this Court overruled *Holder* and held that "once the jury has been properly instructed on the reasonable doubt standard of proof, the defendant is not entitled to an additional instruction on circumstantial evidence even when all the evidence is circumstantial." 134 Idaho at 661-62, 8 P.3d at 656-57. The Court cited to a Supreme Court of West Virginia case in support of having only one standard of proof in criminal cases:

> Circumstantial evidence and direct evidence inherently possess the same probative value. In some instances certain facts can only be established by circumstantial evidence. Hence, we can discern no reason to continue the requirement that circumstantial evidence must be irreconcilable with any reasonable theory of an accused's innocence in order to support a finding of guilt. We agree with those courts that have held that an additional instruction on the sufficiency of circumstantial evidence invites confusion and is unwarranted. Since circumstantial evidence and direct evidence are indistinguishable so far as the jury's fact-finding function is concerned, all that is required of the jury is that it weigh all of the evidence, direct and circumstantial, against the standard of proof beyond a reasonable doubt. Nothing more should be required of a factfinder.

Id. at 661, 8 P.3d at 656 (quoting *State v. Guthrie,* 461 S.E.2d 163, 175 (W.Va. 1995)). Therefore, Idaho law no longer recognizes a distinction between direct and

circumstantial evidence for the purposes of jury instructions.

The district court based its denial of Shackelford's request for a *Holder* instruction on this Court's decision in *Humpherys.* Shackelford argues that the district court's reliance on *Humpherys* violated his constitutional rights by applying an *ex post facto* law. *Ex post facto* laws are prohibited by article I, section 9, clause 3 of the United States Constitution and by article I, section 16 of the Idaho Constitution. The *ex post facto* prohibition forbids Congress and the States from enacting any law "which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed." *Weaver v. Graham,* 450 U.S. 24, 28 (1981) (quoting *Cummings v. Missouri,* 71 U.S. 277, 325-26 (1866)). In accordance with these purposes, two critical elements must be present for a criminal or penal law to be *ex post facto:* (1) it must be retrospective, that is, it must apply to events occurring before its enactment, and (2) it must disadvantage the offender affected by it. *Weaver,* 450 U.S. at 29.

However, if the change is merely procedural, "and does 'not increase the punishment nor change the ingredients of the offense or the ultimate facts necessary to establish guilt,'" there is no *ex post facto* violation. *Id.* at 29 n.12 (quoting *Hopt v. Utah,* 110 U.S. 574, 590 (1884)). "[T]he constitutional provision was intended to secure substantial personal rights against arbitrary and oppressive legislation and not

to limit the legislative control of remedies and modes of procedure which do not affect matters of substance." *Beazell v. Ohio*, 269 U.S. 167, 171 (1925). The Supreme Court in *Collins v. Youngblood* stated that "procedural" can be thought to refer to "changes in the procedures by which a criminal case is adjudicated, as opposed to changes in the substantive law of crimes." 497 U.S. 37, 45 (1990).

We find that the district court did not err in refusing to give a *Holder* instruction here because the change was procedural. *Humpherys* did not change the "substantive law of crimes" but instead recognized that direct and circumstantial evidence possess the same probative value and thus the reasonable doubt standard is applicable to both. It simply clarified that one standard of proof applies to all types of evidence. Shackelford did not have to present any more or any less evidence because the jury would be giving the same weight to the evidence. In addition, counsel for Shackelford did not object to the specific language in Jury Instruction 4 that stated "[t]he law makes no distinction between direct and circumstantial evidence as to the degree of proof required. . . ." Therefore, we find that the district court did not err in failing to give the *Holder* instruction.

c. The jury instructions on the conspiracy counts were proper.

Shackelford asserts that the jury instructions on the conspiracy counts are ambiguous and thus

permitted the jury to return a non-unanimous verdict on proof less than beyond a reasonable doubt, violating his right to due process. The State contends that, because Shackelford was found guilty of the underlying offenses of first-degree murder and first-degree arson, which were both alleged as overt acts, the jury necessarily unanimously found at least one overt act sufficient to establish the conspiracy counts. In the alternative, the State argues that a unanimity instruction was not necessary.

In all felony cases, the jury's verdict must be unanimous; however, a specific unanimity instruction is not always necessary. *State v. Johnson,* 145 Idaho 970, 977, 188 P.3d 912, 919 (2008); Idaho Const. art. I, § 7. In *Johnson,* the appellant relied on a line of cases from the Idaho Court of Appeals that hold that "[a] specific unanimity instruction is required . . . when it appears . . . that a conviction may occur as the result of different jurors concluding that the defendant committed different acts." *Id.* (quoting *State v. Gain,* 140 Idaho 170, 172, 90 P.3d 920, 922 (Ct. App. 2004)). The Court found those cases to not be applicable, however, because in *Johnson* there was not "evidence of more criminal acts than have been charged." *Johnson,* 145 Idaho at 977, 188 P.3d at 919 (quoting *State v. Montoya,* 140 Idaho 160, 167, 90 P.3d 910, 917 (Ct. App. 2004)).

Johnson also cited to *Schad v. Arizona,* 501 U.S. 624 (1991), a United States Supreme Court opinion that found that a specific unanimity instruction was not necessary. The district court in *Schad* instructed

the jury that "[f]irst degree murder is murder which is the result of premeditation. . . . Murder which is committed in the attempt to commit robbery is also first degree murder." *Id.* at 629. The defendant in *Schad* challenged his first-degree murder conviction, arguing that the jury was not instructed to unanimously agree on the alternative theories of premeditated and felony murder. *Id.* at 630. The Supreme Court plurality found the following:

> Petitioner's jury was unanimous in deciding that the State had proved what, under state law, it had to prove: that petitioner murdered either with premeditation or in the course of committing a robbery. . . . We have never suggested that in returning general verdicts in such cases the jurors should be required to agree upon a single means of commission, any more than the indictments were required to specify one alone. In these cases, as in litigation generally, "different jurors may be persuaded by different pieces of evidence, even when they agree upon the bottom line. Plainly there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict."

Id. at 630-32 (quoting *McKoy v. North Carolina*, 494 U.S. 433, 449 (1990) (Blackmun, J., concurring)). The primary concern is that the defendant understands "with some specificity the legal basis of the charge against him." *Schad*, 501 U.S. at 632-33.

Here we find that the jury instructions were proper because unanimity as to each of the preliminary factual issues was not necessary. The jury instruction on conspiracy to commit first-degree murder stated:

> In order for the defendant to be guilty of Conspiracy to Commit First Degree Murder in Count IV, the state must prove each of the following:
>
> 1. On or about 25th to 29th days of May, 1999
>
> 2. In the state of Idaho, County of Latah
>
> 3. the defendant, Dale Carter Shackelford, and Mary Margaret Abitz and Sonja Marie Abitz agreed
>
> 4. to commit the crime of Murder in the First Degree
>
> 5. the defendant intended that the crime would be committed
>
> 6. one of the parties to the agreement performed at least one of the following acts:
>
>   A. Dale Carter Shackelford threatened to kill Donna Fontaine.
>
>   B. Dale Carter Shackelford hid his presence from Donna Fontaine, Gary Fontaine, and Ted Meske.

C. Dale Carter Shackelford went to Donna Fontaine's residence at 2168 Three Bear Road.

D. Dale Carter Shackelford shot Donna Fontaine with a shotgun and pistol, killing her.

7. Such act was done for the purpose of carrying out the agreement.

If any of the above has not been proven beyond a reasonable doubt, then you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, you must find the defendant guilty.

Second, the district court gave the instruction explaining the elements for conspiracy to commit first-degree arson as follows:

In order for the defendant to be guilty of Conspiracy to Commit Arson in the First Degree in Count V, the state must prove each of the following:

1. On or about the 25th to 29th days of May, 1999
2. in the county of Latah
3. in the state of Idaho
4. the defendant, Dale Carter Shackelford, and Mary Margaret Abitz and Sonja Marie Abitz agreed

5. to commit the crime of Arson in the First Degree (as explained in instructions No. 19 and No. 20)

6. the defendant intended that the crime would be committed

7. one of the parties to the agreement performed at least one of the following acts:

   A. Dale Carter Shackelford hid his presence from Donna Fontaine, Gary Fontaine, and Ted Meske;

   B. Dale Carter Shackelford went to Donna Fontaine's residence at 2168 Three Bear Road;

   C. Dale Carter Shackelford poured flammable liquid in the garage at that location;

   D. Dale Carter Shackelford lit fires in both stories of the garage

8. such act was done for the purpose of carrying out the agreement.

If any of the above has not been proven beyond a reasonable doubt, then you must find the defendant not guilty of Conspiracy to Commit Arson in the First Degree. If each of the above has been proven beyond a reasonable doubt, you must find the defendant guilty of Conspiracy to Commit Arson in the First Degre

The jurors were also generally instructed that they were to return unanimous verdicts: "In this case, your verdicts must be unanimous. . . . Your verdicts in this case cannot be arrived at by chance, by lot, or by compromise."

It is the section of each instruction that requires the jury to find "one of the parties to the agreement performed at least one of the following acts" that Shackelford contends violated his right to due process by not requiring the jury make a unanimous finding. However, under *Schad* and *Johnson*, such a finding was not necessary. The jurors here agreed upon the "bottom line": One of the parties performed *at least* one of the acts, and it was not necessary for the jury to reach unanimity on the underlying factual issues, so long as they unanimously decided on the verdict. Therefore, the jury instructions did not violate Shackelford's right to due process.

d. The jury instructions on arson were proper.

Shackelford asserts that Jury Instructions 18 and 19 were ambiguous and misled and confused the jury, as evidenced in the jury's note to the judge, and the failure to correct this ambiguity resulted in a verdict that was not based upon proof beyond a reasonable doubt of the crime of arson as charged in Count III of the Indictment. The State argues that Shackelford failed to establish jury confusion regarding the elements of first-degree arson and that,

because Instruction 19 generally followed the elements of I.C. § 18-801 and 802, Shackelford has failed to establish error.

Idaho Code § 18-801 offers definitions for the crime of arson, such as "damage" and "dwelling." Idaho Code § 18-802 provides that "[a]ny person who willfully and unlawfully, by fire or explosion, damages: (1) Any dwelling, whether occupied or not . . . is guilty of arson in the first degree." Instruction 18 given by the district court reads:

> The Defendant, DALE CARTER SHACKELFORD, in COUNT III is charged with the crime of ARSON IN THE FIRST DEGREE alleged to have been committed as follows:
>
> COUNT III
>
> That the Defendant, DALE CARTER SHACKELFORD, on or about the 29th day of May, 1999, in the County of Latah, State of Idaho, did willfully and unlawfully, by fire or explosion, damage a dwelling, to-wit: a garage with upstairs living quarters located at 2168 Three Bear Road, by pouring a flammable liquid in the building and lighting a fire on both stories.

To such charge the Defendant has pleaded not guilty.

Instruction 19 reads:

> In order for the defendant to be guilty of Arson in the First Degree, the State must prove each of the following:

1. On or about the 29th day of May, 1999
2. in the county of Latah
3. state of Idaho
4. the defendant, Dale Carter Shackelford, willfully
5. by fire or explosion
6. damaged
7. a dwelling, whether occupied or not.

If you find any of the above have not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, you must decide the defendant is guilty of Arson in the First Degree.

The instruction further provided definitions, and Instruction 20 advised the jurors of the distinction between first and second degree arson. Instructions 25 and 26 dealt with the conspiracy to commit arson charges.

The district court received the following question from the jury: "Regarding instruction number 25, 26 number 18, clarification: Must it be determined that the fire was lit on both stories before it can be determined arson? Or that the defendant can be found guilty of arson as in number 18?" After conferencing with the parties, the court responded:

> Ladies and gentlemen, instructions numbered 18 and 25 state the charges of arson in the first degree and conspiracy to commit arson in the first degree, which are contained in the indictment.
>
> Instructions 19 and 26 contain the elements that are necessary for the State to prove beyond a reasonable doubt for the defendant to be found guilty of arson in the first degree and conspiracy to commit arson in the first degree. You will need to review the elements instructions, instruction numbers 19 and 26, to determine the answer to your questions.

We find the jury instructions were not misleading and the court did not err in thus instructing the jury. Jury Instruction 19 stated the applicable law as found in I.C. § 18-802 and there was evidence at trial to support the instructions. Thus, the instructions were proper as they did not mislead the jury or prejudice Shackelford.

e. The district court did not err in instructing the jury regarding accomplice liability.

Shackelford asserts that the district court erred in reading Instruction 33 to the jury, setting forth a theory of accomplice liability, because there was no language charging Shackelford with aiding and abetting in the Indictment and thus there was nothing to put Shackelford on notice to prepare a defense to these charges. He also argues that the

instruction was ambiguous because none of the instructions regarding his participation in the murders of Donna and Fred, the arson, or the preparing of false evidence directed the jury to find that he had aided and abetted any of the crimes. The State counters that Instruction 33 was proper because Idaho has abolished all distinctions between principals and aiders and abetters.

Idaho Code § 19-1430 provides:

> **Distinction between accessories and principals abolished** – The distinction between an accessory before the fact and a principal and between principals in the first and second degree, in cases of felony, is abrogated; and all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, shall hereafter be prosecuted, tried, and punished as principals, and no other facts need be alleged in any indictment against such an accessory than are required in an indictment against his principal.

Thus, Idaho, consistent with many other jurisdictions, has abolished the distinction between principals and aiders and abettors, and instead treats aiding and abetting as a theory under which first-degree murder can be proved – not as a separate offense or a crime of a different nature. *State v. Johnson*, 145 Idaho 970, 973, 188 P.3d 912, 915 (2008). In *Johnson*, this Court found that "it is unnecessary

to instruct the jury that it must be unanimous as to the theoretical basis for committing the offense (aider and abettor or principal) because aiding and abetting is not a separate offense from the substantive crime." *Id.* at 978, 188 P.3d at 920.

Instruction 33 states:

> The law makes no distinction between a person who directly participates in the acts constituting a crime and a person who, either before or during its commission, intentionally aids, assists, facilitates, promotes, encourages, counsels, solicits, invites, helps or hires another to commit a crime with intent to promote or assist in its commission. Both can be found guilty of the crime. Mere presence at, acquiescence in, or silent consent to, the planning or commission of a crime is not sufficient to make one an accomplice.

We find that this instruction stated the applicable law as laid out in I.C. § 19-1430 and *Johnson*. The instruction did not mislead the jury or fail to put Shackelford on notice of the charge because I.C. § 19-1430 allows an aider and abetter to be charged as a principal and "no other facts need be alleged in any indictment" because the distinction between the two is abrogated.

f. The jury instruction on preparing false evidence was proper.

Shackelford next contends that Instruction 30 is ambiguous because the word "produced" is never defined, which makes it impossible to know whether the jury agreed that produced meant to actually make the tape or whether it meant to give the tape to someone or bring it to someone's attention. The State contends that the instruction was not ambiguous because "produced" is a term of common usage that did not need further definition and because Shackelford failed to support the claim with any citation to authority.

Instruction 30 reads:

> In order for the defendant to be guilty of Preparing False Evidence, the State must prove each of the following:
>
> 1. During a period of time between August, 1999, and January 24, 2000
> 2. in the state of Idaho
> 3. the defendant, Dale Carter Shackelford, willfully prepared false evidence
> 4. with the intent to produce it, or allow it to be produced, for any fraudulent or deceitful purpose, as genuine or true

> 5. at a grand jury proceeding in Latah County which was authorized by law.
>
> If you find any of the above have not been proven beyond a reasonable doubt, you must find the defendant not guilty of Preparing False Evidence. If each of the above has been proven beyond a reasonable doubt, you must find the defendant is guilty of Preparing False Evidence.

We find that the term "produced" was not ambiguous in the jury instruction. The jury instruction itself answers the question of what the term "produced" meant because it provides that the evidence was produced "at a grand jury proceeding." Thus, Shackelford's argument that "produced" may have meant actually making the tape or giving the tape to someone or bringing it to someone's attention is invalid because the evidence had to be produced as genuine or true at the actual grand jury proceeding. There is nothing ambiguous about the jury instruction when read in its entirety. Therefore, we find that the jury was properly and adequately instructed.

3. Post-Conviction Issues

Shackelford raises a number of post-conviction issues dealing with the effectiveness of his counsel during the guilt phase of his trial, as well as a *Brady* claim. He maintains that the district court erred in summarily dismissing his claims that he was deprived the right to counsel of choice, and that his

counsel was ineffective due to lack of qualifications, in impeaching State's witnesses, and in preparing defense expert witnesses.

a. Standard of Review

An application for post-conviction relief under the Uniform Post Conviction Procedure Act (UPCPA) is civil in nature. *Workman v. State,* 144 Idaho 518, 522, 164 P.3d 798, 802 (2007). The applicant for post-conviction relief must prove by a preponderance of evidence the allegations upon which the application for post-conviction relief is based. *Id.* Unlike the complaint in an ordinary civil action, however, an application for post-conviction relief must contain more than "a short and plain statement of the claim" that would suffice for a complaint under I.R.C.P. 8(a)(1). *Id.* Rather, an application for post-conviction relief must be verified with respect to facts within the personal knowledge of the applicant. *Id.* "The application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal." *State v. Payne,* 146 Idaho 548, 561, 199 P.3d 123, 136 (2008); *see also* I.C. § 19-4903.

b. The district court did not err in denying Shackelford's *Brady* claim.

Shackelford asserts that the State failed to disclose material that would have undermined the testimony of Dr. Robert Cihak in the form of peer

review notes provided by Dr. John Howard. The State contends that Shackelford failed to establish that the State was required to disclose Dr. Howard's notes or that the notes would have resulted in a different verdict.

The United States Supreme Court held in *Brady v. Maryland,* 373 U.S. 83, 87 (1963), that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. Subsequent to *Brady,* the Supreme Court expanded the duty to include volunteering exculpatory evidence never requested, or requested only in a general way. *United States v. Bagley,* 473 U.S. 667, 682 (1985). However, the prosecution need volunteer evidence only when suppression of the evidence would be "of sufficient significance to result in the denial of the defendant's right to a fair trial." *United States v. Agurs,* 427 U.S. 97, 108 (1976). Showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a *Brady* violation, without more. *Kyles v. Whitley,* 514 U.S. 419, 437 (1995).

To prove a *Brady* violation, three components must be shown: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene,* 527 U.S. 263, 281-82 (1999). Thus,

a new trial is not automatically required whenever "'a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict. . . .'" *Giglio v. United States*, 405 U.S. 150, 154 (1972). Instead, the Supreme Court has held that regardless of request, favorable evidence is material, and constitutional error results from its suppression by the government, "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different." *Kyles*, 514 U.S at 433 (1995) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)). A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial." *Kyles*, 514 U.S. at 434 (quoting *Bagley*, 473 U.S. at 678).

Dr. Cihak testified regarding his "guesstimate" that, based on his examination of the contents of Fred's stomach, Fred had eaten "probably several hours before he – within several hours of his death." There are many factors that affect digestion, and Dr. Cihak offered that "one can never be exact because one doesn't know at the time of autopsy what was going on necessarily from the time that victim has eaten." He also explained that determining how long contents had been in the stomach was "a very controversial area. And there are people that feel some factors either speed or delay, and other people will take the opposite. This is a very, let us say, not scientifically identified area." Dr. Cihak also testified

that his findings had been "peer review[ed]." In his post-conviction claims, Shackelford contended that the State withheld exculpatory evidence by failing to disclose the peer review notes of Dr. John Howard. However, as the district court found below, Shackelford was provided with the notes of Dr. Howard but was not provided with the abstracts that accompanied the notes, which consisted of several scientific articles questioning the validity of determining a victim's time of death based upon stomach content. As the court pointed out, the abstracts came from medical journals that were generally available and did not contradict Dr. Cihak's testimony that he could offer only a "guesstimate" of the time of death.

On appeal, Shackelford's only statement regarding the notes of Dr. Howard is as follows: "The State failed to disclose material which would have undermined the testimony of Dr. Cihak. This evidence consists of peer review notes provided by Dr. John Howard concerning Dr. Cihak's 'guesstimate' of the time of death based on stomach contents." Shackelford argues nothing about how the abstracts or the notes would have undermined the testimony, nor how he was prejudiced by any failure to disclose the notes. Furthermore, we find that there was no prejudice because Dr. Cihak himself testified that determining time of death based on stomach contents was a "controversial" and "not scientifically identified" area. We find that the district court did not err in denying Shackelford's *Brady* claim because he has not shown the reasonable probability of a different result.

c. Shackelford was not deprived of his right to counsel of choice.

Shackelford argues that because the Latah County Sheriff's Department seized nearly $5,000 in cash from him, he could not afford to hire a lawyer. He contends in his brief on appeal that he solicited at least four private criminal defense lawyers for representation, including James Siebe, and testified that the $5,000 could have covered the expense of hiring an attorney for his initial appearance. Shackelford asserts that the failure to allow him to choose his own counsel violates his qualified right to choice of counsel and constitutes prejudicial error per se.

The State maintains that Shackelford failed to establish that $5,000 would have retained an attorney to represent him in a capital double murder case and therefore this claim fails. The State also argues that Shackelford has not challenged the district court's findings, particularly with regard to his "evasiveness," and that the $5,000 would have been insufficient to do more than retain counsel for the "initial proceedings." In addition, Shackelford presented no evidence that he had assets close to the $500,000 trial counsel were paid to represent Shackelford.

The Sixth Amendment guarantees defendants in criminal cases the right to adequate representation and to a qualified right to choice of counsel, but "those who do not have the means to hire their own lawyers have no cognizable complaint so long as they

are adequately represented by attorneys appointed by the courts." *Caplin & Drysdale, Chartered v. U.S.*, 491 U.S. 617, 624 (1989). "[A] defendant may not insist on representation by an attorney he cannot afford." *Id.* (quoting *Wheat v. United States*, 486 U.S. 153, 159 (1988)). However, where the right to choice of counsel is wrongly denied by a court, it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation. *U.S. v. Gonzalez-Lopez*, 548 U.S. 140, 148 (2006). Instead, "[d]eprivation of the right is 'complete' when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received." *Id.*

We find that the district court did not err in appointing counsel to represent Shackelford because Shackelford did not demonstrate that he had the means to hire his own lawyer, nor did he ever request specific counsel of choice. During Shackelford's initial appearance on February 14, 2000, the court asked Shackelford if he would like to be considered for appointment of counsel at the public's expense, to which Shackelford replied that he would. The court then gave Shackelford a form to fill out regarding his financial ability. Shackelford repeatedly avoided filling out the form, arguing that he did not have the information he needed to fill it out. He did receive a

letter from James Siebe on March 7, 2000,[9] which stated:

> I am very much disturbed about the manner in which the prosecutor has deprived you of your assets when it came time for hiring a lawyer; notwithstanding the potential for succeeding in your lawsuit (which may very well take as much as those funds are worth) and trying to obtain a release of the same, it does not appear that the sum total of those amounts would be sufficient to hire an attorney for representation in a capital murder case. On the other hand, had you had this money available to you at the time of your arrest I am not so certain I would not have been able to take the case had I a belief that the court would appoint a second chair counsel to assist me in that endeavor.

However, it is unclear if the "assets" Mr. Siebe is referring to is the $5,000 or a different amount that he had been offered by Shackelford, and his statement that he may have been able to take the case was dependant on the court's appointment of a co-counsel. Furthermore, he stated that the money available would not have been enough to hire an attorney for

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[9] The appointment of counsel occurred on February 15, 2000, and this letter from March 7, 2000, was submitted during Shackelford's post-conviction proceedings as evidence on this issue. Therefore, there is no evidence that the letter was presented during the pre-trial proceedings as part of an effort on Shackelford's part to choose counsel.

representation. This is consistent with Shackelford's own statement during his initial appearance: "So, again, I have talked with counsel James Siebe and a Mr. Walker, both which have described to me that a case of this magnitude is going to take at least $100,000. I can just about guarantee I don't have that much in my canteen account, Your Honor."

The district court made the following findings and conclusions on this issue:

> The Petitioner was given several opportunities during the early stages of his case to show he had the wherewithal to hire an attorney during his criminal proceedings. He was unable to do so. He also engaged in evasiveness to a degree never before or since witnessed by this Court. The Petitioner has not, and cannot, allege that the $5,000 seized would have been sufficient to finance his defense to capital murder. Such a claim is absurd. The Petitioner's trial counsel, . . . were jointly paid over $500,000 to represent the Petitioner through his sentencing. Arguing that $5,000, one-hundredth of the amount spent, would have been sufficient to secure representation on a case of this magnitude is ludicrous. The Petitioner was not deprived of the right to counsel of his choice.

We agree, and find that Shackelford was not deprived of his right to counsel of choice.

d. Shackelford was not deprived of effective assistance of counsel.

Claims for ineffective assistance of counsel are reviewed utilizing the two-prong test set forth in *Strickland v. Washington,* 466 U.S. 668 (1984). *See Mitchell v. State,* 132 Idaho 274, 277, 971 P.2d 727, 730 (1998). To prevail on such a claim, the applicant for post-conviction relief must demonstrate (1) counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's errors, the result would have been different. *Strickland,* 466 U.S. at 687-88, 692; *Mitchell,* 132 Idaho at 277, 971 P.2d at 730. When evaluating an ineffective assistance of counsel claim, this Court does not second-guess strategic and tactical decisions, and such decisions cannot serve as a basis for post-conviction relief unless the decision is shown to have resulted from inadequate preparation, ignorance of the relevant law, or other shortcomings capable of objective review. *Pratt v. State,* 134 Idaho 581, 584, 6 P.3d 831, 834 (2000).

"There is a 'strong presumption that counsel's performance fell within the wide range of professional assistance.'" *State v. Hairston,* 133 Idaho 496, 511, 988 P.2d 1170, 1185 (1999) (quoting *Aragon v. State,* 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988)). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland,* 466 U.S. at 686. The burden is on

the defendant to show a "reasonable probability" that the result would have been different. *Wong v. Belmontes,* 130 S.Ct. 383, 390 (2009). A court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies: "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Strickland,* 466 U.S. at 697; *see also Belmontes,* 130 S.Ct. at 386.

The State argues that Shackelford has failed to support his claims of ineffective assistance of counsel with any authority or argument; thus, they are waived. While Shackelford has cited to very little authority in support of his arguments, we will still address each of his arguments.

i. Deprivation of effective assistance of counsel due to lack of qualifications

Shackelford first contends that his right to effective assistance of counsel was violated because Ray Barker was not on the Idaho Supreme Court roster of attorneys qualified for appointment as lead counsel in death penalty cases pursuant to Idaho Criminal Rule 44.3. The State counters that the district court held a hearing regarding Barker's

qualifications and expressly noted that I.C.R. 44.3 had been suspended,[10] which Shackelford did not dispute. In addition, the court found "Mr. Barker qualifies by experience to be lead counsel," as permitted under I.C.R. 44.3(8).[11]

However, I.C.R. 44.3(8) did not exist until the rule was amended and became effective March 15, 2001. Instead, when Shackelford was appointed counsel, the rule existed in a form very similar to what it is today, just without sub-section 8. *See* I.C.R. 44.3 (2000). In *State v. Hairston,* 133 Idaho 496, 988 P.2d 1170 (1999), this Court addressed qualifications of counsel in capital cases without relying on I.C.R. 44.3. In *Hairston,* the defendant alleged ineffective assistance of counsel because neither of his attorneys representing him had any prior trial experience in capital cases. *Hairston,* 133 Idaho at 511, 988 P.2d at 1185. The Court found his argument unpersuasive and stated: "Counsel was not ineffective solely

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[10] However, the history of the rule shows that it was amended and effective as of February 15, 2000, when counsel was appointed for Shackelford.

[11] Idaho Criminal Rule 44.3(8) states:

> Notwithstanding the requirement of this rule that all appointments shall be from the court-maintained rosters, if an appointment of counsel from the rosters cannot practically and expeditiously be made, the appointing court may appoint one or more counsel who are not on the roster but who otherwise meet the qualifications set out in this rule.

I.C.R. 44.3 (2008).

because of inexperience in capital trials. The constitution does not establish a minimum level of experience for the appointment of counsel in a death penalty case." *Id.*

While I.C.R. 44.3 was in effect at the time Shackelford was appointed counsel on February 15, 2000, Shackelford has failed to demonstrate how the appointment of counsel not listed on the Idaho Supreme Court roster pursuant to the rule automatically resulted in ineffective assistance of counsel. He simply argues that Mr. Barker was not on the roster and his lack of qualifications contributed to violations of Shackelford's right to effective assistance of counsel. The district court evaluated Mr. Barker's qualifications and expressly found that he was qualified based upon the standards for qualification laid out in I.C.R. 44.3:

> I do make a finding that even though Rule 44.3 has been suspended by the Idaho Supreme Court that Mr. Barker qualifies by experience to be lead counsel. I also make a finding that Mr. Mahaffy qualifies as co-counsel under the rule that has been suspended. And I do conclude that Mr. Barker and Mr. Mahaffy provide adequate representation for Mr. Shackelford in a capital case.

We find that Shackelford has not demonstrated that counsel's performance fell below an objective standard of reasonableness or that he was in anyway prejudiced by counsel not being on the Idaho Supreme Court roster.

ii. Impeaching State's witnesses

Shackelford next argues that counsel failed to adequately impeach PJ Baker and Katherine Baker. He contends that trial counsel did not know about PJ's significant criminal record, other than a felony conviction related to a bombing, and a reasonably competent attorney would have vigorously impeached PJ on these matters. He asserts that had a more vigorous impeachment been conducted, the jury would not have believed PJ's testimony and the result of his trial would have been different. Shackelford contends that his trial counsel failed to adequately impeach Katherine because there were inconsistencies in her testimony that went unnoticed by counsel and thus by the jury. Again, he asserts that a more vigorous impeachment of Katherine would have weakened PJ's testimony and led the jury to not believe PJ.

The State asserts that Shackelford has failed to explain how further impeachment of these two witnesses would have changed the outcome of his trial. The State explains that the jury was aware that PJ was a convicted felon and that the State had granted him immunity as concerned PJ's charge of handling of a firearm by a convicted felon. The State further contends that Shackelford's claim regarding Katherine fails because he has not demonstrated prejudice and counsel's actions were reasonable.

As was expressed in *Strickland v. Washington*, 466 U.S. 668 (1984), we need not address whether counsel's performance in impeaching the Bakers was

deficient before examining whether Shackelford demonstrated that he was prejudiced as a result of the alleged deficiencies. *Strickland,* 466 U.S. at 697. Shackelford has argued that the jury would not have believed the testimony of PJ and the outcome of the trial would have been different. However, he offers no explanation as to how the outcome would have differed and why the jury would not have believed PJ. In addition, the jury was aware that PJ was a convicted felon and that he had been granted immunity by the State. Shackelford has not shown how the evidence of any other crimes committed by PJ, even assuming they were admissible pursuant to I.R.E. 609, would have otherwise altered the jury's opinion of PJ. Furthermore, Shackelford failed to demonstrate how counsel's impeachment of Katherine prejudiced him. Thus, we find Shackelford's counsel were not ineffective in their impeachment of the State's witnesses as Shackelford has not demonstrated that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland,* 466 U.S. at 686.

iii. Preparing defense expert witnesses

Shackelford next contends that his counsel were ineffective in preparing their arson expert, Don Perkins, and their ballistics expert, Kay Sweeney. He asserts that counsel did not have Perkins investigate the fire scene until the evening before his testimony,

review any crime scene photographs until the day of his testimony, or speak to trial counsel about his testimony until just hours before he testified. Because Perkins was not adequately prepared, his testimony was not helpful in rebutting the State's fire expert. In addition, Shackelford contends that trial counsel failed to supply Sweeney with the necessary foundational support for his opinion that the State's theory regarding the location of the shooter and the victims was not valid; therefore, the exhibit supporting the testimony was rejected and the force of Sweeney's testimony undermined.

The State counters that Shackelford's allegations that Perkins was not adequately prepared were based upon pure speculation, and that Shackelford failed to establish any benefit that would have been gained from providing Perkins with additional material or preparation. In addition, Shackelford failed to provide any evidence of how, if Perkins had been better prepared, that additional preparation would have affected the outcome of the trial. Finally, the State argues that, at best, Sweeney's exhibit was merely cumulative evidence, which would not have changed the outcome of Shackelford's trial.

Perkins testified that he viewed the following to prepare for his trial testimony:

> The documents you [defense counsel] provided me include the following: A copy of the Deary Fire Department incident report, a copy of the Lewiston fire report and the investigation report. You provided me a copy of

> Mr. Don Howard's report, you also provided me testimony, the courtroom testimony, of Mr. Howard. You provided me with the report from Mr. Lauper, the Idaho State Fire Marshall, and his report and also his testimony.
>
> You've also provided me with some photographs of the fire scene taken by investigators. And you've also provided me with some additional written statements, written by Gary Fontaine and Ted Meske on the evening of this incident. I also had the opportunity to visit the fire scene late yesterday afternoon. . . . I shoveled off the whole pad so that I could physically see the burn patterns and the materials that were left that's been shown me in the photographs provided.

Perkins testified that the fact that he had started reviewing documents in the middle of November had not impacted his opinion because he "had ample time to review the documents." There was no recross-examination of Perkins that demonstrated any problems with him not having time to prepare other than questions about the physical scene. Perkins was able to review all of the pictures offered by the State and he reviewed the State's experts' investigations and reports. Shackelford does not indicate how he was prejudiced so "that the trial cannot be relied on as having produced a just result" because of counsel's preparation of Perkins. *Strickland*, 466 U.S. at 686. Perkins testified that he was adequately prepared and Shackelford has not shown a reasonable probability

that the result would have been different had Perkins been more prepared. Therefore, we find that Shackelford was not prejudiced by any deficiencies in counsel's preparation of Perkins.

Similarly, Shackelford has not demonstrated that he was prejudiced or that the outcome of the trial would have been any different had trial counsel adequately prepared Sweeney. He contends that if the exhibit had been provided, the jury would have known that the State's theory was flawed, but Sweeney testified to this matter and the exhibit was simply offered for illustrative purposes. Shackelford again has shown no reasonable probability that the result would have differed if the exhibit had been allowed. Therefore, we find that Shackelford's right to effective assistance of counsel was not violated, and the district court did not err in summarily dismissing his claim for post-conviction relief.

4. Cumulative error did not deprive Shackelford of a fair trial.

Shackelford argues that the accumulation of irregularities aggregated to show the absence of a fair trial. Therefore, he asserts, the cumulative error doctrine requires a reversal of the conviction as the trial contravened his right to due process. Under the cumulative error doctrine, "an accumulation of irregularities, each of which might be harmless in itself, may in the aggregate reveal the absence of a fair trial in contravention of the defendant's right to due

process." *State v. Severson*, 147 Idaho 694, ___, 215 P.3d 414, 443 (2009) (quoting *State v. Martinez*, 125 Idaho 445, 453, 872 P.2d 708, 716 (1994)). The presence of errors alone, however, does not require the reversal of a conviction. *State v. Moore*, 131 Idaho 814, 823, 965 P.2d 174, 183 (1998). The cumulative effect of the errors we have noted, when viewed in relation to the totality of the evidence presented at trial, did not deprive Shackelford of a fair trial.

B. Sentencing Phase

The State has cross-appealed the district court's grant of post-conviction relief under *Ring v. Arizona*, 536 U.S. 584 (2002), which set aside Shackelford's death sentences for resentencing by a jury. The State argues that, because the weighing of mitigating factors under I.C. § 19-2515(c) does not increase the penalty from life to death, but actually reduces the penalty from death to life, the weighing process is not the functional equivalent of an element of a greater offense and, therefore, the jury was not mandated to complete the weighing process in Shackelford's case. In addition, the State argues that since the jury's first-degree murder verdicts established that Shackelford murdered Donna and Fred at the same location and date, it follows that the jury found the multiple murder aggravator of I.C. § 19-2515(h)(2) (2000) beyond a reasonable doubt.

Shackelford contends that his death sentence is unconstitutional under *Ring* because the jury did not

make the findings of fact that made Shackelford eligible for the sentence of death. He argues that the jury could not have found the aggravating circumstance under I.C. § 19-2515(h)(2) because the jury did not take part in Shackelford's sentencing proceedings and the guilt-phase verdict is not sufficient to conclude that the jury would have found the statutory aggravating circumstances beyond a reasonable doubt. Alternatively, Shackelford argues that even if this Court finds that the district judge could permissibly infer the requisite finding of the statutory aggravator in this case, the district court's vacation of Shackelford's death sentence must be affirmed because the jury did not weigh the aggravator against the mitigating circumstances.

Both Shackelford and the State agree that *Ring v. Arizona* applies because the Supreme Court released the decision in *Ring* during the time the direct review of this case was pending. *See Griffith v. Kentucky*, 479 U.S. 314, 323 (1987). The district court found that Shackelford's death sentence should be set aside because a jury, not a judge, must weigh the mitigating factors against the aggravating factors. The court did not agree with Shackelford's contention, however, that the jury did not find any of the aggravating factors. Instead, the district court found that the jury's verdicts for first-degree murder of both Donna and Fred established the existence of multiple murders and thus found the statutory aggravator beyond a reasonable doubt pursuant to I.C. § 19-2515(h)(2). Specifically, the court stated: "[T]he jury

found the Petitioner guilty of the first degree murders of both Donna Fontaine and Fred Palahniuk at the same location and on the same date. Those verdicts, standing alone, appear to establish the existence of multiple murders which constitutes a statutory aggravator beyond a reasonable doubt."

The jury here found Shackelford guilty of the first-degree murder of both Donna and Fred by general verdict, which respectively read: "As to the charge of First Degree Murder of Donna Fontaine [Fred Palahniuk], we, the Jury in the above entitled cause, find the defendant: Guilty." The verdicts for the murders of both Donna and Fred were based on jury instructions that instructed the jury to find beyond a reasonable doubt that "the killing occurred in Latah County, and in the State of Idaho" and that "the killing occurred on or about the 29th day of May, 1999." The district court's finding of aggravating factors in its original imposition of the death sentences was based on both I.C. § 19-2515(h)(2) (2000) and I.C. § 19-2515(h)(10) (2000), in the case of Donna, and I.C. § 19-2515(h)(2), in the case of Fred. In its Findings of the Court in Considering Death Penalty, the district court found, as to Donna's murder, that the State had proven beyond a reasonable doubt two statutory aggravating factors, including: (1) at the time the murder was committed the defendant also committed another murder, I.C. § 19-2515(h)(2), and (2) the murder was committed against a witness or potential witness in a criminal or civil proceeding because of such proceeding, I.C. § 19-2515(h)(10). As

to Fred's murder, the court found beyond a reasonable doubt one statutory aggravating factor, that at the time the murder was committed the defendant also committed another murder, I.C. § 19-2515(h)(2).

The Sixth Amendment entitles capital defendants "to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Ring,* 536 U.S. at 589. The effect of *Ring* was to convert statutory aggravating circumstances relevant to sentencing into "the functional equivalent of an element of a greater offense," which must be proved to a jury beyond a reasonable doubt. *Id.* at 606-09; *Apprendi v. New Jersey,* 530 U.S. 466, 482-84 (2000). Thus, *Ring* rendered unconstitutional the sentencing scheme of I.C. § 19-2515 (2001), which required the trial judge to make the factual findings regarding the existence of aggravating circumstances. *State v. Lovelace* (*Lovelace I*), 140 Idaho 53, 66-67, 90 P.3d 278, 291-92 (2003). "This Court must first resolve whether the error is harmless beyond a reasonable doubt where the statutory aggravating factors, which render a defendant death eligible, were neither included in the instructions to the jury nor proven beyond a reasonable doubt." *State v. Lovelace* (*Lovelace II*), 140 Idaho 73, 79, 90 P.3d 298, 304 (2004). This Court will find harmless error under such circumstances only if no reasonable jury could find that the State failed to prove the aggravating factors beyond a reasonable doubt. *Id.*

Based in part on the reasoning presented in a line of Alabama cases,[12] the State maintains that verdicts produced at the guilt stage of a trial can show that the jury found a defendant guilty of aggravating factors. These findings by the jury in this instance, the State argues, meet the criteria for the multiple-murder aggravator, I.C. § 19-2515(h)(2). A similar argument was advanced by the State in *Lovelace II*. There, Lovelace had been found guilty of first-degree murder and first-degree kidnapping. *Lovelace I*, 140 Idaho at 59, 90 P.3d at 284. However, the State argued that because the jury had found Lovelace guilty of kidnapping, it was harmless error that the trial court did not include the statutory aggravating factors in the instructions to the jury. *Lovelace II*, 140 Idaho at 79, 90 P.3d at 304. This Court noted that the State was "asking the Court to determine what the jury would have found had it been presented with instructions defining [the statutory aggravating factors that were] to be applied to the facts surrounding the murder." *Id.*

To engage in appellate hindsight on this issue, such as that advanced by the State, is constitutionally infirm. First, it violates the jury-trial guarantee for a court to "hypothesize a guilty verdict that was never in fact rendered – no matter how inescapable the findings to support the verdict might be[.]"

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[12] The cases include *Turner v. State*, 924 So.2d 737 (Ala. Crim. App. 2002); *Irvin v. State*, 940 So.2d 331 (Ala. Crim. App. 2005); and *Tomlin v. State*, 909 So.2d 213 (Ala. Crim. App. 2002).

Sullivan v. Louisiana, 508 U.S. 275, 279 (1993). Next, the Sixth Amendment "requires more than appellate speculation about a hypothetical jury's action." *Id.* at 280. Moreover, to accept the State's argument would be to look at the form of the jury verdict, rather than the effect of using it to sentence Shackelford to death. *Ring* instructs that this cannot be done. 536 U.S. at 604. Rather, when presented with this same argument by Arizona – that the defendant had been found guilty of a crime which could also serve as an aggravating factor – the Supreme Court noted that this argument overlooks the relevant inquiry of effect, rather than form. *Id.* Instead, if "a State makes an increase in a defendant's authorized punishment contingent on the finding of fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." *Id.* at 602. Therefore, a "defendant may not be exposed to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone." *Id.* at 602 (quoting *Apprendi*, 530 U.S. at 483) (alterations removed).

In this case, the charge to the jury on first-degree murder for both Donna and Fred had elements including that the killing occurred in Latah County and on or about May 29, 1999. The verdict form reads simply: "As to the charge of First Degree Murder of Donna Fontaine [Fred Palahniuk], we, the Jury in the above entitled cause, find the defendant: Guilty." There was no finding by this jury that, at the same

time one murder was committed, the defendant committed another murder.

Therefore, we affirm the district court's decision vacating Shackelford's sentence and its determination that Shackelford must be resentenced by a jury under *Ring* because we cannot find beyond a reasonable doubt that a reasonable jury could find that the State proved that Donna and Fred were killed at the same time. Without analyzing whether *Ring* requires a jury to weigh mitigating factors, this Court finds that the jury was required to find the aggravator, and such a finding was not explicit in the first-degree murder verdicts.

III. CONCLUSION

We affirm the district court on all issues. We affirm on the order for resentencing on different grounds and remand for a sentencing hearing pursuant to § 19-2515 (2008).

Chief Justice **EISMANN** and Justices J. JONES, W. JONES and HORTON, **CONCUR**.

CASE NO. CV01-04272
April 8, 2005 9:40 AM
CLERK OF DISTRICT COURT
LATAH COUNTY
BY [Illegible] DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

DALE CARTER SHACKELFORD Petitioner, vs. STATE OF IDAHO, Respondent.	Case No. CV-01-004272 [SP-01-00366] **MEMORANDUM DECISION AND ORDER REGARDING THE PETITIONER'S MOTION FOR SUMMARY DISPOSITION**

The Petitioner, Dale Shackelford, has filed a motion for partial summary disposition of his claims under the Uniform Post-Conviction Procedures Act. I.C. §§ 19-4901-4911. Oral argument on the motion was heard on November 15 and 16, 2004. The Petitioner was represented by Mark Ackley and Kimberly Simmons of the State Appellate Public Defender's Office. The Petitioner participated by telephone from the Idaho State Correctional Institution in Boise. The State was represented by Robin Eckmann, Senior Deputy Prosecuting Attorney for Latah County. The Petitioner's motion is now ready for disposition.

The Petitioner makes four arguments in favor of summary disposition. These are: (1) the admission of testimonial statements by unavailable witnesses violated his right to confrontation under the Sixth Amendment to the United States Constitution; (2) the instructions resulted in a questionable verdict; (3) this Court lacked personal jurisdiction and therefore his conviction must be set aside; and (4) the Supreme Court's decision in *Ring v. Arizona* requires the sentences of death to be set aside. Each of these four arguments will be addressed in turn.

1. Has Mr. Shackelford's right to confrontation been violated?

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal cases, the accused shall enjoy the right . . . to be confronted with witnesses against him." In the recent case of *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the United States Supreme Court held that out-of-court testimonial hearsay may not be admitted unless the defendant had an opportunity to cross-examine the witnesses against him. The majority opinion held: "Our cases have thus remained faithful to the Framers' understanding: Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." *Crawford*, 541 U.S. at 59, 124 S.Ct. at 1369. The Petitioner has objected to

specific statements attributed to various individuals. Each will be analyzed separately.

a. Statements attributed to Mary Abitz.

During the trial, the prosecution was permitted to elicit testimony from Sergeant Earl Aston regarding statements made to him by Mary Abitz in the course of his investigation. Some of the statements involved a tape that Mary Abitz claimed the Petitioner had sent to her. However, these statements are not hearsay because they were not offered for the truth of the matter asserted. "The [Confrontation] Clause . . . does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Crawford,* 541 U.S. at 59, 124 S.Ct. at 1369, *citing Tennessee v. Street,* 471 U.S. 409, 414, 105 S.Ct. 2078, 2082, 85 L.Ed. 425 (1985). Because the statements of Mary Abitz regarding the genesis of the tape were not offered for the truth of the matter asserted, they are not hearsay and are not prohibited by *Crawford.* In addition, the statements attributed to Mary Abitz regarding the staged argument tape were cumulative in that Bernadette Lasater testified that she herself participated in recording the tape at the direction of the Petitioner. Consequently, the Petitioner's argument that Mary Abitz's testimony should have been excluded is in error.

b. Questions attributed to Deputy Prosecutor Robin Eckmann by Sergeant Aston.

The Petitioner next challenges questions attributed to Deputy Prosecutor Robin Eckmann when she and Sergeant Aston were interrogating Mary Abitz. Because a question is not an assertion, it is not hearsay. *Stoddard v. State*, 850 A.2d 406, 418 (Md.App. 2004). *See also* DAVID F. BINDER, HEARSAY HANDBOOK § 2:2 (4th ed. 2001): "Many out of court utterances fall within such categories as greetings, pleasantries, expressions of gratitude, courtesies, *questions*, offers, instructions, warnings, exclamations, expressions of joy, annoyance, or other emotion, etc. Such utterances are not intended expressions of fact or opinion. They are not assertions, at least for purposes of the hearsay rule. Thus they are not hearsay." *Id.* (italics added). Consequently, the out of court questions attributed to Ms. Eckmann are not hearsay and are not excludable by *Crawford*.

c. Statements attributed to Mary Abitz by Detective Kurtis Hall.

The Petitioner next contends statements made by Mary Abitz to Kurtis Hall regarding a tape recording should have been excluded. While the Petitioner has not referred to the trial transcript, this Court assumes the references to the testimony appear at pages 2795-2797 in the transcript. Those statements were not offered for the truth of any matters asserted and thus the prohibition established in *Crawford*

does not apply to them. *Crawford,* 541 U.S. at 68, 124 S.Ct. at 1374.

d. Mary Abitz's calendar.

The Petitioner next argues the calendar of Mary Abitz, which was admitted in evidence at trial as a statement of a co-conspirator, should have been excluded. A co-conspirator's statement made in furtherance of the conspiracy may be admitted without violating the Confrontation Clause even in light of *Crawford. See, e.g., U.S. v. Lee,* 374 F.3d 637, 644 (8th Cir. 2004); and *U.S. v. Reyes,* 362 F.3d 536, 540-41 (8th Cir. 2004). Furthermore, the statements attributed to Mary Abitz from her calendar are clearly not "testimonial" as that term is used in *Crawford.* The calendar is not an affidavit, nor does it constitute sworn testimony. There is nothing about it which would suggest that in making it Mary Abitz anticipated it would be available for later use at trial. Consequently, the admission of the calendar was not a violation of the Petitioner's right to confrontation.

e. Death certificates of Donna Fontaine and Fred Palahniuk.

Finally, the Petitioner maintains the admission of the death certificates of Donna Fontaine and Fred Palahniuk are prohibited by *Crawford* and should not have been introduced. The majority opinion in *Crawford* suggested, *in dicta,* that business records are not testimonial and therefore are not subject to a

Confrontation Clause analysis. *Crawford,* 541 U.S. at 56, 124 S.Ct. at 1367. At least one court has concluded that business records are not testimonial under *Crawford.* In *State v. Thackaberry,* 95 P.3d 1142, 1145, (Ore.App. 2004), the Oregon Court of Appeals held "a laboratory report may be analogous to – or arguably even the same as – a business or official record, which the Court in *Crawford* suggested *in dictum* would not be subject to its holding." These death certificates appear to be business or official records and hence not subject to *Crawford.* It should also be noted the death certificates were offered in addition to the live testimony of Dr. Cihak, a pathologist, who described the injuries to both victims and rendered his opinion that the cause of death in both instances was homicide. As a result the death certificates, even if not business or official records, were merely cumulative.

2. Did the jury instructions result in a questionable verdict?

The Petitioner's Motion for Partial Summary Disposition lists several jury instructions which he alleges resulted in a questionable verdict. The Petitioner argues he is entitled to a unanimous jury verdict as guaranteed by Article II, Section 2 of the Sixth Amendment of the United States Constitution. "In reviewing jury instructions, the relevant inquiry is whether the instructions as a whole are misleading or inadequate to guide the jury's deliberation." *U.S. v. Garcia-Rivera,* 353 F.3d 788, 792 (9th Cir. 2003),

citing U.S. v. Frega, 179 P.3d 793, 806 n.16 (9th Cir. 1999).

a. Instructions Numbered 23 and 26 – Conspiracy Instructions

Instructions 23 and 26 instructed the jury regarding conspiracy to commit murder in the first degree and conspiracy to commit arson in the first degree, respectively. In each of these instructions, the jurors were given four options as to acts which constituted an overt act required for conspiracy. The Petitioner argues that because the jurors were not told they needed to unanimously agree on one overt act, it is impossible to determine which overt act the jurors agreed upon in each of these charges.

Instructions Number 41 and 43 both informed the jury that its verdict needed to be unanimous. Because the jury found the Petitioner guilty of first degree murder of Donna Fontaine and guilty of first degree arson (both listed as overt acts in the conspiracy instruction) the question of which overt act they agreed upon is not seriously at issue. In reading the instructions as a whole, it does not appear that these instructions were misleading or inadequate.

b. Instruction Number 30 – False Evidence Instruction

The Petitioner argues the word "produced" which appears in Instruction Number 30, was not defined and the jury might not have unanimously agreed on a

single definition. In *State v. Zichko,* the Idaho Supreme Court stated "[o]rdinarily the language employed by the legislature in defining a crime is deemed to be best suited for that purpose, and error cannot be predicated on its use in jury instructions." 129 Idaho 259, 264, 923 P.2d 966, 971 (1996). "Terms which are of common usage and are sufficiently generally understood need not be further defined when instructing the jury." *Id.* Because the word "produced" is a word of common usage, and a word employed by the legislature in the statute, it was unnecessary that the jury be instructed as to its definition.

c. Instruction Number 33 – Accomplice Instruction.

The Petitioner was indicted by a grand jury on February 11, 2000, and charged with two counts of murder in the first degree, one count of arson in the first degree, one count of preparing false evidence, one count of conspiracy to commit murder in the first degree and one count of conspiracy to commit arson in the first degree. Instruction Number 33, which was read to the jury, reads as follows:

> The law makes no distinction between a person who directly participates in the acts constituting a crime and the person who, either before or after its commission, intentionally aids, assists, facilitates, promotes, encourages, counsels, solicits, invites, helps or hires another to commit a crime with intent to

> promote or assist in its commission. Both can be found guilty of the crime. The presence at, acquiescence in, or silent consent to, the planning or commission of a crime is not sufficient to make one an accomplice.

(R. Vol. XI, p. 2212.) The Petitioner contends that because the indictment did not charge him with being an accomplice, rather it charged him with being a principal, he was not sufficiently apprised of the charge against him. and the instruction constituted a deprivation of his rights to due process. The Petitioner relies on *State v. Chapa,* 127 Idaho 786, 906 P.2d 636 (Ct. App. 1995) for this argument. *Chapa* is distinguishable on its face. In *Chapa,* the defendant was charged with personally committing the act of rape; however, the jury was instructed that he could be convicted of two separate offenses – one on the basis that he committed rape – the other on the basis that he aided and abetted the rape of the victim by his codefendant. The effect was that while only being charged with rape, he could be found guilty of two substantive crimes. The Court held, "[t]he inclusion of more than one offense in a single count of the charging document is a pleading defect referred to as 'duplicity.' *Id.* at 789, 906 P.2d at 639. These are not the facts which apply to the Petitioner.

The State has correctly responded that *State v. Wheeler,* 109 Idaho 795, 711 P.2d 741 (Ct. App. 1986) is the case which is applicable to these facts. In *Wheeler,* the defendant and another person were both present at the killing. The defense at trial was that

the other person was the actual killer. In this case, Brian Abitz was in contact with the Petitioner on May 29, 1999, and behaved in a manner that was suspicious. Although there was no direct evidence that Brian Abitz had ever been to the scene of the murders, there was no way to conclusively prove he did not participate in the murders at the behest of the Petitioner. In light of these facts, it was essential for the jury to understand that, in the event it concluded Brian Abitz actually committed the murders, but did so at the direction of the Petitioner, the Petitioner was just as culpable as if he had pulled the trigger himself. Just like the defendant in *Wheeler,* the Petitioner was advised of the act he was charged with committing. Under Idaho's law, there is no distinction between a principal and one who aids and abets. I.C. § 18-204. Consequently, the Petitioner's challenge to the jury instruction on the basis that he was not apprised of the charge against him is not applicable.

d. Instructions Numbered 18 and 19 – Arson.

The Petitioner argues the instructions relating to arson are ambiguous because Instruction Number 18 required the jury to find that the fire was lit on both stories, but Instruction Number 19 did not require a finding that the fire was lit on both stories.

During deliberations the jury asked: "Must it be determined that the fire was lit on both stories before it can be determined arson? Or that the defendant can be found guilty of arson as in number 18?" (Tr. p.

5450, 11. 2-6.) This Court explained to the jury that the elements of arson were found in Instructions 19 and 26 and that the jury would need to review those elements instructions to determine the answer to their question. (Tr. p. 5460, 11. 7-25).

The Petitioner argues he was not adequately informed of the charges against him because of the statement "on both stories" in the indictment. Instructions 19 and 26 adequately and accurately outlined the elements upon which the Petitioner could be found guilty of arson. Consequently, the challenge to the arson instructions fails.

3. Should Mr. Shackelford's conviction be set aside for lack of personal jurisdiction?

The Petitioner next contends his conviction should be set aside because this Court lacked personal jurisdiction over him. The Petitioner claims he was arrested while still under subpoena for the grand jury proceeding, and further that he was immune from arrest while under the legal compulsion of that subpoena.

On December 27, 1999, the Petitioner was present in Idaho visiting for the Christmas holiday. That evening, Sergeant Aston served the Petitioner with a subpoena calling for him to be present to testify at the Latah County grand jury investigating this matter. The Petitioner argues his conviction should be set aside for lack of personal jurisdiction because he was arrested while still under subpoena for the

grand jury proceedings. As noted, the Petitioner was served with a subpoena while in Idaho of his own volition. Consequently, the State did not invoke the Uniform Act to Secure Witnesses in serving the Petitioner with his subpoena. This fact is critical: "[I]mmunity from process is not available to a witness when the statutory requisites of the Uniform Act are not met." *State v. New,* 536 N.W.2d 714, 717 (S.D. 1995) *citing In Re Schuler,* 120 N.J. Super. 79, 293 A.2d 404 (1972).

Idaho Code § 19-3005(2) of the Uniform Act mandates a certificate be presented to a judge in the county where the out of state witness is found. That code section reads:

> If a person in any state, which by its laws has made provisions for commanding persons within its borders to attend and testify in criminal hearings or prosecutions in this state, is a material witness in a hearing or prosecution pending in a court of record in this state, a judge of such court may issue a certificate under the seal of the court stating these facts and specifying the number of days the witness will be required at such hearing or prosecution. This certificate shall be presented to a judge of a court of record in the county in which the witness is found.

Because the Petitioner was subpoenaed in Idaho, this procedure was never invoked. Consequently, the Petitioner's contention he was immune from arrest is simply not accurate.

In addition, the Petitioner's failure to effectively raise this objection at an earlier time means it has been waived. "A claim of exemption from arrest must be interposed in the proceeding at the first opportunity, or it is waived. It cannot be presented for the first time after judgment or upon appeal. Also, it has been held that in a criminal case any exemption from criminal arrest is waived by going to trial on a plea of not guilty." 5 Am.Jur.2d Arrest § 143 p. 768 (1995). The Petitioner never adequately raised this argument prior to his filing a petition for post-conviction relief. As a result, any argument that the Petitioner was arrested illegally has been waived by him.

4. Does *Ring v. Arizona* require the Petitioner's death sentences to be set aside?

Finally, the Petitioner argues his death sentences should be set aside because *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), requires a jury to sentence someone to death. Given that the jury did not sentence the Petitioner to death, he contends his death sentences should be set aside. Both parties agree *Ring v. Arizona* applies to this case because the Supreme Court released its decision in *Ring* during the time the direct review of this case was pending. *See Griffith v. Kentucky,* 479 U.S. 314, 323, 107 S.Ct. 708, 713, 93 L.Ed.2d 649 (1987).

The Petitioner contends the jury did not find, beyond a reasonable doubt, any aggravating factors, as required by the statute. I.C. § 19-2515. However,

the jury found the Petitioner guilty of the first degree murders of both Donna Fontaine and Fred Palahniuk at the same location and on the same date. Those verdicts, standing alone, appear to establish the existence of multiple murders which constitutes a statutory aggravator beyond a reasonable doubt. I.C. § 19-2515(9)(b). Nevertheless, a finding by this Court that a statutory aggravator exists does not end the inquiry.

The net issue which must be addressed is whether a jury, as opposed to a judge, must weigh any mitigating factors against the aggravating factors. Even if it is assumed the jury found an aggravating factor, the jury clearly did not participate in weighing mitigating factors. The process of weighing aggravating factors against mitigating factors was decided exclusively by this Court. In weighing those factors, this Court concluded the death sentence was appropriate for both of the Petitioner's convictions of first degree murder.

The case law which has developed post-*Ring* supports the Petitioner's contention that the jury should also weigh mitigating factors before imposing a death sentence. In each of those jurisdictions which formerly permitted judicial imposition of a death sentence in capital cases, the states' highest courts have held that a jury must weigh the aggravating factor against mitigation in order to determine whether a sentence of death should be imposed. The state Supreme Courts in Nevada, Colorado, Arizona and Missouri have each held that under *Ring*, the

weighing of mitigation against aggravation must be done by a jury.

In *Johnson v. State*, 59 P.3d 450 (Nev. 2002), the Nevada Supreme Court acknowledged that a defendant may only receive a death penalty if the jury "finds at least one aggravating circumstance *and further finds* that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found." *Id.* at 460 (citations omitted, italics in original). The Court went on:

> [E]ven though *Ring* expressly abstained from ruling on any "Sixth Amendment Claim with respect to mitigating circumstances," we conclude that *Ring* requires a jury to make this finding as well: "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt."
>
> . . .
>
> Even if the guilty verdicts necessarily entailed the jury's finding of the two aggravators found by the three-judge panel, the guilt-phase verdicts did not and could not entail the required consideration of mitigating evidence.

Id. at 460-61 (citations omitted).

In *Woldt v.People*, 64 P.3d 256 (Colo. 2003), the Colorado Supreme Court held that Colorado's pre-*Ring* death penalty statute required a three-judge panel to: (1) find at least one statutory aggravating

factor existed beyond a reasonable doubt, (2) decide if evidence of mitigating factors existed, (3) decide whether the mitigating factors outweighed the aggravating factors, and, (4) determine whether the defendant should be sentenced to death. "Under this sentencing system, steps one, two, and three were prerequisites to a finding by the three-judge panel that a defendant was eligible for death." *Id.* at 265. Following *Ring*, the Colorado Supreme Court held:

> Because the Sixth Amendment requires that a jury find any facts necessary to make a defendant eligible for the death penalty, and the first three steps of section 16-11-103, 6 C.R.S. (2000), required judges to make findings of fact that render a defendant eligible for death, the statute under which Woldt and Martinez received their death sentences is unconstitutional on its face.

Id. at 266-67.

In *State v. Pandeli*, 65 P.3d 950 (Ariz. 2003), the Arizona Supreme Court held that *Ring* required a weighing by a jury of the mitigating circumstances. In Arizona, the Court held "[w]e also must consider whether reversible error occurred with respect to the mitigating circumstances." *State v. Pandeli*, 65 P.3d 950, 953 (Ariz. 2003). Finding that mitigation was a factor to be weighed by a jury the Court vacated Pandeli's death sentence because "[a] different finding of mitigating circumstances could affect the determination whether the mitigating circumstances are 'sufficiently substantial to call for leniency.'" *Id.*

In *State v. Whitfield,* 107 S.W.3d 253 (Mo. 2003), the Missouri Supreme Court ruled that *Ring* applies to its sentencing procedure, including the determination of the weight to be given mitigating evidence. Under Missouri's statute, the trier of fact must follow four steps in arriving at an appropriate sentence. First, the trier of fact must find the existence of at least one statutory aggravating factor; second, the trier of fact must find the evidence in aggravation of punishment warrants imposition of a death sentence; third, the trier of fact must conclude the evidence in aggravation of punishment outweighs the evidence in mitigation of punishment; and, fourth, the trier of fact must decide under all the circumstances the death penalty is the appropriate punishment. In *Whitfield,* the trial judge made determinations in all four steps after the jury could not reach a unanimous decision. Although the Missouri Supreme Court held that it was not error for the trial court to find a statutory aggravator under step one, the Court overturned the trial court's findings made in steps two and three because they violated *Ring.* The Court held "[t]he *jury* is required to determine whether the statutory and other aggravators shown by the evidence warrants the imposition of death." *Whitfield,* 107 S.W.3d at 259 (italics in original). The Court, citing the decisions in Arizona, Colorado and Nevada, held that steps two and three "require factual findings that are prerequisites to the trier of fact's determination that a defendant is death-eligible." *Whitfield,* 107 S.W.3d at 261.

To repeat, all of the appellate courts in those states which had sentencing schemes similar to Idaho's, which have been called upon to evaluate the involvement of a jury in determining mitigating factors, have decided that a jury's involvement is a constitutional prerequisite before a death sentence may be imposed.

The statutory scheme under which the Petitioner was sentenced reads:

> Where a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless . . . the court finds at least one (1) statutory aggravating circumstances. Where the court finds a statutory aggravating circumstance the court shall sentence the defendant to death *unless the court finds that mitigating circumstances which may be presented are sufficiently compelling that the death penalty would be unjust.*

Idaho Code § 19-2515(c) (amended 2003) (italics added). The Idaho Supreme Court has interpreted this provision to mean "that the trial court may sentence the defendant to death, only if the trial court finds that all the mitigating circumstances do not outweigh the gravity of each of the aggravating circumstances found and make imposition of death unjust." *State v. Charboneau*, 116 Idaho 129, 153, 774 P.2d 299, 323 (1989).

Idaho's sentencing scheme, both at the time the Petitioner was sentenced and after *Ring* necessitated

its amendment, requires the factfinder to weigh the aggravating circumstances against the mitigating circumstances. Given Idaho's statutory scheme which required a factfinder to weigh mitigating factors against aggravating factors before imposing a sentence of death, this Court concludes the death sentences imposed in this case should be set aside as unconstitutional based on *Ring* and its progeny. A jury, not a judge, is required to weigh mitigating circumstances against aggravating factors to determine whether a death sentence is appropriate. The unanimous agreement of the Supreme Courts of Nevada, Colorado, Arizona and Missouri bolster this Court's conclusion.

ORDER

IT IS ORDERED that the Petitioner's Motion for Summary Disposition on issues 1, 2, and 3 is DENIED.

IT IS ORDERED that the Petitioner's Motion for Summary Disposition on issue 4 is GRANTED. The sentences of death for the murders of Donna Fontaine and Fred Palahniuk, imposed by this Court on October 25, 2001, are SET ASIDE.

Dated this 8th day of April 2005.

/s/ John R. Stegner
John R. Stegner
District Judge

In the Supreme Court of the State of Idaho

STATE OF IDAHO, Plaintiff-Respondent-Cross Appellant, v. DALE CARTER SHACKELFORD, Defendant-Appellant-Cross Respondent.	***AMENDED*** ORDER DENYING PETITION FOR REHEARING Supreme Court Docket Nos. 27966-2001 & 31928-2005 Latah County Docket No. 2000-260 Ref. No. 10-5

The Respondent having filed a PETITION FOR REHEARING on February 9, 2010 and supporting BRIEF on March 19, 2010 and the Appellant having filed a PETITION FOR REHEARING on February 10, 2010 and supporting BRIEF on March 24, 2010 of the Court's Opinion released January 20, 2010; therefore, after due consideration,

IT IS HEREBY ORDERED that Respondent's and Appellant's PETITIONS FOR REHEARING be, and hereby are, DENIED as the Court will issue a Substitute Opinion.

DATED this 2nd day of June NUNC PRO TUNC ***May*** 28, 2010.

By Order of the Supreme Court

/s/ Dorothy Beaver for
Stephen W. Kenyon, Clerk

CASE NO. CR 00 00260
Dec. 22 2000
CLERK OF DISTRICT COURT
LATAH COUNTY
BY [Illegible] DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

STATE OF IDAHO,
Plaintiff,
vs.
DALE CARTER SHACKELFORD,
Defendant.

Case No. CR-00-00260

JURY INSTRUCTIONS GIVEN AT TRIAL

* * *

INSTRUCTION NO. 6

The Defendant, DALE CARTER SHACKELFORD, in Count I is charged with the crime of MURDER IN THE FIRST DEGREE alleged to have been committed as follows:

COUNT I

That the Defendant, DALE CARTER SHACKELFORD, on or about the 29th day of May, 1999, in the County of Latah, State of Idaho, did wilfully, unlawfully, deliberately, with premeditation and with malice

aforethought, kill and murder Donna Fontaine, a human being, by shooting her with a shotgun and a.32 caliber pistol, from which she died.

To such charge the Defendant has pleaded not guilty.

INSTRUCTION NO.7

The Defendant, DALE CARTER SHACKELFORD, in COUNT II is charged with the crime of MURDER IN THE FIRST DEGREE alleged to have, been committed as follows:

COUNT II

That the Defendant, DALE CARTER SHACKELFORD, on or about the 29th day of May, 1999, in the County of Latah, State of Idaho, did wilfully, unlawfully, deliberately, with premeditation and with malice aforethought, kill and murder Fred Palahniuk, a human being, by shooting him with a.32 caliber pistol, from which he died.

To such charge the Defendant has pleaded not guilty.

INSTRUCTION NO. 8

In order to find the Defendant, DALE CARTER SHACKELFORD, guilty of MURDER IN THE FIRST DEGREE of Donna Fontaine as charged in the

Indictment, you must find beyond a reasonable doubt that each of the following elements has been proven:

(1) That the Defendant killed Donna Fontaine, a human being;

(2) That the killing was unlawful;

(3) That the killing was done with malice;

(4) That the killing was willful;

(5) That the killing was deliberate;

(6) That the killing was premeditated;

(7) That the killing occurred in Latah County, and in the State of Idaho;

(8) That the killing occurred on or about the 29th day of May, 1999.

If you find any of the material elements has not been proved beyond a reasonable doubt, then you must return a verdict finding the defendant not guilty of the charge of MURDER IN THE FIRST DEGREE of Donna Fontaine.

On the other hand, if the evidence in this case convinces you beyond a reasonable doubt that each and every one of these material elements has been proved, you must return a verdict finding the defendant guilty of the charge of MURDER IN THE FIRST DEGREE of Donna Fontaine.

* * *

INSTRUCTION NO.15

In order to find the Defendant, DALE CARTER SHACKELFORD, guilty of MURDER IN THE FIRST DEGREE of Fred Palahniuk as charged in the Indictment, you must find beyond a reasonable doubt that each of the following elements has been proven:

(1) That the Defendant killed Fred Palahniuk, a human being;

(2) That the killing was unlawful;

(3) That the killing was done with malice;

(4) That the killing was willful;

(5) That the killing was deliberate;

(6) That the killing was premeditated;

(7) That the killing occurred in Latah County, and in the State of Idaho;

(8) That the killing occurred on or about the 29th day of May, 1999.

If you find any of the material elements has not been proved beyond a reasonable doubt, then you must return a verdict finding the Defendant not guilty of the charge of MURDER IN THE FIRST DEGREE of Fred Palahniuk.

On the other hand, if the evidence in this case convinces you beyond a reasonable doubt that each and every one of these material elements has been proved, you must return a verdict finding the

defendant guilty of the charge of MURDER IN THE FIRST DEGREE of Fred Palahniuk.

* * *

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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

STATE OF IDAHO, Plaintiff, vs. DALE CARTER SHACKELFORD, Defendant.	Case No. **CR-00-00260** VERDICT

As to the charge of First Degree Murder of Fred Palahniuk, we, the Jury in the above entitled cause, find the defendant:

Guilty X

Not Guilty ___

DATED this 22nd of December, 2000.

/s/ Lori Bruce
Presiding Juror

Recorded 12/22/00
11:33 AM
[Illegible] Deputy

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

STATE OF IDAHO, Plaintiff, vs. DALE CARTER SHACKELFORD, Defendant.	)	Case No. **CR-00-00260** VERDICT

As to the charge of First Degree Murder of Donna Fontaine, we, the Jury in the above entitled cause, find the defendant:

Guilty X

Not Guilty ___

DATED this 22nd of December, 2000.

/s/ Lori Bruce
Presiding Juror

No. 10-589

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2010

STATE OF IDAHO-Petitioner,

vs. **CAPITAL CASE**

DALE CARTER SHACKELFORD-Respondent.

BRIEF IN OPPOSITION TO PETITION FOR

WRIT OF CERTIORARI TO

THE SUPREME COURT OF THE STATE OF IDAHO

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**Counsel of Record*

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner, the State of Idaho, seeks this Court's review of the unanimous decision of the Idaho Supreme Court vacating Dale Carter Shackelford's death sentence and ordering that Shackelford be resentenced by a jury pursuant to the dictates of *Ring v. Arizona*, 536 U.S. 584 (2002). This petition should be denied because, among other reasons, Petitioner materially misstates the holding of the Idaho Supreme Court.

STATEMENT OF THE CASE

Shackelford was convicted by the jury of the first degree murders of Donna Fontaine and Fred Pahlaniuk. According to the indictment and the jury instructions, the murders were committed in Latah County, Idaho, "on or about the 29th day of May, 1999." (App. 76) [1] Donna and Fred were last seen alive on the morning of May 29, 1999, and their bodies were discovered in a building which had been destroyed by a fire which was discovered that evening. (App. 3-4). There were no eyewitnesses to the crime. There was no testimony placing Shackelford at the scene of the crime, nor were the times of the deaths definitively established. Because the case was tried before this Court's decision in *Ring*, the trial judge, without any input from the jury, determined that Idaho's multiple murder aggravating circumstance applied, weighed the aggravating circumstances against the mitigating circumstances, and sentenced Shackelford to death.

The trial judge reasoned that because the murders were committed on the same date and at the same location, the murders were committed "at the same time" pursuant to Idaho's

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[1]For ease of reference, Respondent has attached to this Brief as an addendum the cited pages from the Appendix.

multiple murder aggravating circumstance, I.C. § 19-2515(h)(2) (2000). However, the jury was not asked whether, nor did it expressly find that, the murders were committed "at the same time", nor was the jury provided with a definition of the term "at the same time". Although there was evidence from which the jury could have found that the murders were committed on the same day and in the same vicinity, the Idaho Supreme Court later stated that it could not " find beyond a reasonable doubt that a reasonable jury could find that the state proved that Donna and Fred were killed at the same time." (App. 80).

Idaho's unitary system of capital case review required that Shackelford's direct appeal was stayed pending the completion of post conviction proceedings in the district court. Therefore, because Shackelford's direct appeal was not yet final when this court announced the *Ring* decision, it is undisputed that *Ring* applies to this case and that *Ring* error occurred in the penalty phase of Shackelford's trial. Thus it was the district court which first addressed Shackelford's *Ring* claim during the post-conviction proceedings. The district court reasoned that Shackelford's death sentence should be set aside because, in its view, *Ring* required a jury, not a judge, to weigh the mitigating factors against the aggravating factors. (App. 75) The district court did not agree with Shackelford's contention that the jury did not find any aggravating factors. Instead, the district court found that the jury's verdicts for first degree murder of both Fred and Donna established the existence of the multiple murder aggravator pursuant to I.C. §19-2515(h)(2). (App. 75) The district court found that because the "jury found [Shackelford] guilty of the first degree murders of both Donna Fontaine and Fred Palaniuk at the same location and on the same date" the verdicts established the existence of multiple murders "which constitutes a statutory aggravator beyond a reasonable doubt." (App. 75-76)

The State appealed the district court's ruling that Shackelford's death sentence be set aside and that he be resentenced by a jury. The Idaho Supreme Court affirmed the district court's decision that Shackelford must be resentenced, but did so on a different ground. The Idaho Supreme Court specifically held as follows:

> Therefore, we affirm the district court's decision vacating Shackelford's sentence and its determination that Shackelford must be resentenced by a jury under *Ring because we cannot find beyond a reasonable doubt that a reasonable jury could find that the State proved that Donna and Fred were killed at the same time.* Without analyzing whether *Ring* requires a jury to weigh mitigating factors, this Court finds that the jury was required to find the aggravator, and such a finding was not explicit in the first-degree murder verdicts.

(App. 80). (emphasis supplied).

In reaching this conclusion, the court stated that it must "first resolve *whether the error is harmless beyond a reasonable doubt* where the statutory aggravating factors, which render a defendant death eligible, were neither included in the instructions to the jury nor proven beyond a reasonable doubt." (App. 77)(emphasis supplied). The court followed its decision in an earlier Idaho *pre-Ring* judge sentencing case, *State v. Lovelace (Lovelace II)*, 140 Idaho 73, 79, 90 P.3rd 298, 304 (2004) in which the court had applied a *de facto* harmless error analysis to a *Ring* claim.

REASONS FOR DENYING THE PETITION

1. THE QUESTIONS PRESENTED ARE PREMISED ON PETITIONER'S MISSTATEMENT OF THE HOLDING OF THE IDAHO SUPREME COURT.

Question Presented Number 1 states in pertinent part:

> Because statutory aggravating factors are the functional equivalent of a greater offense and the failure to instruct the jury regarding the multiple murder aggravator did not vitiate all of the jury's findings, did the Idaho Supreme Court

err by concluding *Ring* error is not subject to harmless error analysis?

Petition at i-ii. The Idaho Supreme Court did not conclude that "*Ring* error is not subject to harmless error analysis". To the contrary, in holding that the *Ring* error in Shackelford's case required resentencing by a jury, the Idaho Supreme Court did apply a *de facto* harmless error analysis to the error. Nor did the Idaho Supreme Court treat the *Ring* error as structural.

A. The Idaho Supreme Court applied a *de facto* harmless error analysis of the *Ring* error in this case.

The holding of the Idaho Supreme Court is as follows:

> Therefore, we affirm the district court's decision vacating Shackelford's sentence and its determination that Shackelford must be resentenced by a jury under *Ring because we cannot find beyond a reasonable doubt that a reasonable jury could find that the State proved that Donna and Fred were killed at the same time.* Without analyzing whether *Ring* requires a jury to weigh mitigating factors, this Court finds that the jury was required to find the aggravator, and such a finding was not explicit in the first-degree murder verdicts.

(App. 80). (emphasis supplied). In reaching this conclusion, the Idaho Supreme Court did indeed conduct harmless error review. The court stated that it must "first resolve *whether the error is harmless beyond a reasonable doubt* where the statutory aggravating factors, which render a defendant death eligible, were neither included in the instructions to the jury nor proven beyond a reasonable doubt." (App. 77)(emphasis supplied). The court followed its decision in an earlier Idaho *pre-Ring* judge sentencing case, *State v. Lovelace (Lovelace II)*, 140 Idaho 73, 79, 90 P.3rd 298, 304 (2004) in which the court had applied a *de facto* harmless error analysis to a *Ring* claim.

The Idaho Supreme Court conducted a *de facto* harmless error review and found that the

evidence presented at Shackelford's trial did not establish beyond a reasonable doubt that the murders were committed at the same time. However the Petitioner chooses to label the analysis used by the Idaho Supreme Court, the court examined the evidence and made a factual determination that the state's proof at trial did not establish beyond a reasonable doubt that the murders were committed at the same time. Petitioner is simply unhappy with the result of the Idaho Supreme Court's analysis and fact-finding and wants this Court to reexamine the facts of the case. Petitioner also seeks to have this court provide a different definition of the Idaho multiple murder aggravating circumstance than that employed by the state of Idaho's highest court.

B. The Idaho Supreme Court did not treat the *Ring* error as structural.

Petitioner begins the argument section of the Petition with the assertion that "[t]he Idaho Supreme Court's conclusion that *Ring* error is 'structural' and cannot be reviewed for harmless error is an important federal constitutional question and one upon which there is now a conflict and significant controversy." (Pet. at 8). However, Petitioner is unable to cite to exactly where in the opinion of the Idaho Supreme Court is found "the conclusion that *Ring* error is structural". This is because the Idaho Supreme Court did no such thing. No fair reading of the decision of the Idaho Supreme Court reveals that the Court was treating *Ring* error in this case as structural.

There is no conflict and significant controversy caused by the Idaho Supreme Court's decision in this case because the Idaho Supreme Court did not treat the *Ring* error as structural.

II. THE DECISION OF THE IDAHO SUPREME COURT RESTS UPON AN INDEPENDENT AND ADEQUATE STATE GROUND

Petitioner does not argue that the Idaho Supreme Court misstated this Court's holding in

Ring. The decision of the Idaho Supreme Court rests in substantial part on that court's rejection of the district court's finding that because the murders were committed on the same date and at the same location, the murders necessarily were committed "at the same time" pursuant to the Idaho multiple murder aggravating circumstance. (App. 75-76, 79-80). I.C. §19-2515(h)(2). The Idaho Supreme Court's definition of and application of the phrase "at the same time" to the facts of this case is an independent and adequate state ground for the decision below. Accordingly, this court lacks jurisdiction to review the decision of the Idaho Supreme Court.

III. HOW THE IDAHO SUPREME COURT CHOOSES TO DEFINE AND APPLY A STATE LAW AGGRAVATING CIRCUMSTANCE TO THE PARTICULAR FACTS OF THIS CASE DOES NOT PRESENT AN IMPORTANT CONSTITUTIONAL QUESTION WORTHY OF THIS COURT'S REVIEW

It is for the Idaho Supreme Court to define the phrase "at the same time" contained in Idaho's multiple murder aggravator and to apply its definition to the particular facts of this case. The Idaho Supreme Court found as a factual matter that the evidence presented at trial did not prove beyond a reasonable doubt that the murders were committed "at the same time". (App. 80). This Court does not "grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Supreme Court Rule 10. Petitioner is asking this court to reexamine the facts of this case and to second guess the Idaho Supreme Court's determination that the evidence at trial did not establish beyond a reasonable doubt that the murders were committed at the same time. The principles of comity and federalism require that the Idaho Supreme Court be the final arbiter of the application of state law to the facts of a given case.

IV. THIS CASE WILL HAVE LITTLE OR NO IMPACT ON FUTURE OR PENDING CASES.

Petitioner's claim that the decision of the Idaho Supreme Court will create continuing analytical difficulty in addressing future capital cases is wrong for several reasons. First, Petitioner's argument is based on the incorrect assertion, as demonstrated above, that the Idaho Supreme Court mistakenly believed that it could not apply harmless error analysis to *Ring* error when the court did apply a *de facto* harmless error analysis in this case. Second, Petitioner cites to no specific examples of pending cases in any jurisdiction where a court is confronted with *Ring* error on direct review. This is because all of the former judge-sentencing states have adopted capital case jury determination of death eligibility in response to *Ring*. It is difficult to imagine how a *Ring* error as occurred in this case could reoccur.

There are no Idaho capital cases which are pending on direct review which involve *Ring* error. Furthermore, Idaho has refused to apply state law to afford *Ring* relief to cases on collateral review. *McKinney v. State (In re Rhoades)*, 2010 Ida. LEXIS 103, Idaho Supreme Court, June 4, 2010. Likewise, it is difficult to imagine how the decision of the Idaho Supreme Court will cause any difficulty or confusion in adjudicating federal habeas cases because this court has held that *Ring* will not be retroactively applied to cases already final on direct review. *Schriro v. Summerlin*, 542 U.S. 348 (2004).

CONCLUSION

The decision of the Idaho Supreme Court is fact bound and does not involve constitutional questions of broad importance. The decision of the Idaho Supreme Court correctly applied *Ring* to the unique facts of this case and will have limited, if any, application to other cases. Finally, it is the primary responsibility of the Idaho courts, not this Court, to define and apply an Idaho statute to the particular facts of this case. For all of the foregoing reasons, Respondent respectfully urges that this Court DENY the petition for writ of certiorari.

RESPECTFULLY SUBMITTED THIS 4TH DAY OF FEBRUARY, 2011.

Leo N. Griffard
Counsel of Record for Respondent

IDAHO v. SHACKELFORD

No. 10-589

ADDENDUM TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EXCERPTS FROM PETITIONER'S APPENDIX

BURDICK, Justice

Dale Carter Shackelford appeals from his judgment of conviction, based upon jury verdicts finding him guilty of the first-degree murders of Donna Fontaine and Fred Palahniuk, conspiracy to commit first-degree murder, first-degree arson, conspiracy to commit first-degree arson, and preparing false evidence. He also appeals from his sentences of death for first-degree murder, as well as the partial denial of his claims for post-conviction relief. The State cross-appeals, challenging the district court's grant of post-conviction relief, which set aside Shackelford's death sentences and requires resentencing. We find that any error committed by the district court was harmless, and we therefore affirm on all issues. We affirm the district court's order for resentencing on different grounds.

I. FACTUAL AND PROCEDURAL BACKGROUND

Dale Shackelford was convicted of the murders of his ex-wife, Donna Fontaine, and her boyfriend, Fred Palahniuk, which occurred near the Latah County town of Kendrick, Idaho, in May 1999. The State alleged that Shackelford conspired with Martha Millar, Bernadette Lasater, Mary Abitz, Sonja Abitz, and, John Abitz.[1] Millar and Lasater worked for

[1] The charges against John Abitz were eventually dismissed.

Shackelford's trucking business, Shackelford Enterprises, in Missouri. The Abitz family lived near the residence where the bodies of Donna and Fred were found. Sonja Abitz was Shackelford's fiancée at the time of the murders, and John and Mary Abitz are Sonja's parents. The alleged conspirators eventually pled guilty to charges related to the murders.

Shackelford and Donna married in Missouri in December 1995 and the relationship ended in the summer of 1997, with the couple divorcing in November of that year. Donna accused Shackelford of raping her in July 1997, and charges were filed in 1998. In the spring of 1999, Donna developed a relationship with Fred and, on May 28, 1999, the two visited Donna's brother, Gary Fontaine, at the home Gary and Donna's daughter owned together outside of Kendrick. The morning of May 29, Donna, Fred, and Gary went to the Locust Blossom Festival in Kendrick, where they met John, Mary, and Sonja Abitz.

After leaving the festival, Gary went to the Abitz's house, but he left around dark, returned home, noticed Donna's pickup in the driveway, and smelled smoke. Gary called the Abitz's house and reported that his two-story garage was on fire. Mary, Sonja, Ted Meske (Mary's brother), and Shackelford arrived at the fire and various individuals tried to extinguish it, but were unsuccessful.

At 7:40 p.m., Latah County Sheriff Patrol Deputy Richard Skiles was called to investigate the fire at

2168 Three Bear Road. When Skiles arrived at the scene, nearly an hour later, he observed several persons – including Gary Fontaine, Mary Abitz, Sonja Abitz, Brian Abitz (Sonja's brother), Ted Meske, and Shackelford – standing near the garage that was completely engulfed in flames. Based upon information obtained from Ted and Shackelford, Deputy Skiles contacted dispatch to have an on-call detective sent "because there was a possibility there could be a suicide victim in the fire." By the time the fire department arrived, the garage had been utterly destroyed. Several hours later, after the fire had been extinguished, two bodies were found in the rubble. The bodies were subsequently identified as the remains of Donna and Fred. At trial, a state fire investigator testified as to his opinion that the fire was arson.

Doctor Robert Cihak conducted autopsies of the remains, which were severely burned. Shotgun pellets were found in Donna's right chest region and a bullet was found in the back of her neck. Dr. Cihak opined that the bullet wound was fatal and was inflicted when Donna was still alive. A bullet was also found in Fred's body behind the upper breastbone, which Dr. Cihak concluded was the cause of death. Dr. Cihak offered his opinion that Donna and Fred were dead at the time of the fire.

Shackelford was indicted on February 11, 2000, and charged with two counts of first-degree murder, first-degree arson, conspiracy to commit first-degree murder, conspiracy to commit arson, and preparing

false evidence. Trial began on October 16, 2000, and concluded December 22, 2000. The jury returned guilty verdicts on all counts charged in the Indictment. Sentencing commenced on August 27, 2001, and, on October 25, 2001, the district court read its Findings of the Court in Considering Death Penalty. As to Donna's murder, the court found that the State had proven beyond a reasonable doubt two statutory aggravating factors: I.C. § 19-2515(h)(2) (2000) and I.C. § 19-2515(h)(10) (2000).[2] As to Fred's murder, the court found the statutory aggravating factor under I.C. § 19-2515(h)(2) (2000). After weighing the mitigating factors against the individual statutory aggravating factors, the court concluded that the mitigating factors were not sufficiently compelling to render the death penalty unjust, and sentenced Shackelford to death for both first-degree murders. Shackelford was also given prison sentences for the other felony offenses. The judgment of conviction was filed November 1, 2001. Shackelford appeals from his convictions.

On April 8, 2005, the district court addressed the parties' motions for summary disposition regarding Shackelford's petitions for post-conviction relief. The court granted Shackelford sentencing relief, concluding that *Ring v. Arizona*, 536 U.S. 584 (2002), mandated that the jury conduct the weighing of

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[2] The statutes are currently codified at I.C. §§ 19-2515(9)(b) and (9)(k) and consist of identical language.

> 5. at a grand jury proceeding in Latah County which was authorized by law.
>
> If you find any of the above have not been proven beyond a reasonable doubt, you must find the defendant not guilty of Preparing False Evidence. If each of the above has been proven beyond a reasonable doubt, you must find the defendant is guilty of Preparing False Evidence.

We find that the term "produced" was not ambiguous in the jury instruction. The jury instruction itself answers the question of what the term "produced" meant because it provides that the evidence was produced "at a grand jury proceeding." Thus, Shackelford's argument that "produced" may have meant actually making the tape or giving the tape to someone or bringing it to someone's attention is invalid because the evidence had to be produced as genuine or true at the actual grand jury proceeding. There is nothing ambiguous about the jury instruction when read in its entirety. Therefore, we find that the jury was properly and adequately instructed.

3. Post-Conviction Issues

Shackelford raises a number of post-conviction issues dealing with the effectiveness of his counsel during the guilt phase of his trial, as well as a *Brady* claim. He maintains that the district court erred in summarily dismissing his claims that he was deprived the right to counsel of choice, and that his

counsel was ineffective due to lack of qualifications, in impeaching State's witnesses, and in preparing defense expert witnesses.

a. Standard of Review

An application for post-conviction relief under the Uniform Post Conviction Procedure Act (UPCPA) is civil in nature. *Workman v. State,* 144 Idaho 518, 522, 164 P.3d 798, 802 (2007). The applicant for post-conviction relief must prove by a preponderance of evidence the allegations upon which the application for post-conviction relief is based. *Id.* Unlike the complaint in an ordinary civil action, however, an application for post-conviction relief must contain more than "a short and plain statement of the claim" that would suffice for a complaint under I.R.C.P. 8(a)(1). *Id.* Rather, an application for post-conviction relief must be verified with respect to facts within the personal knowledge of the applicant. *Id.* "The application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal." *State v. Payne,* 146 Idaho 548, 561, 199 P.3d 123, 136 (2008); *see also* I.C. § 19-4903.

b. The district court did not err in denying Shackelford's *Brady* claim.

Shackelford asserts that the State failed to disclose material that would have undermined the testimony of Dr. Robert Cihak in the form of peer

review notes provided by Dr. John Howard. The State contends that Shackelford failed to establish that the State was required to disclose Dr. Howard's notes or that the notes would have resulted in a different verdict.

The United States Supreme Court held in *Brady v. Maryland,* 373 U.S. 83, 87 (1963), that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. Subsequent to *Brady,* the Supreme Court expanded the duty to include volunteering exculpatory evidence never requested, or requested only in a general way. *United States v. Bagley,* 473 U.S. 667, 682 (1985). However, the prosecution need volunteer evidence only when suppression of the evidence would be "of sufficient significance to result in the denial of the defendant's right to a fair trial." *United States v. Agurs,* 427 U.S. 97, 108 (1976). Showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a *Brady* violation, without more. *Kyles v. Whitley,* 514 U.S. 419, 437 (1995).

To prove a *Brady* violation, three components must be shown: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene,* 527 U.S. 263, 281-82 (1999). Thus,

a new trial is not automatically required whenever "'a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict. . . .'" *Giglio v. United States,* 405 U.S. 150, 154 (1972). Instead, the Supreme Court has held that regardless of request, favorable evidence is material, and constitutional error results from its suppression by the government, "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different." *Kyles,* 514 U.S at 433 (1995) (quoting *United States v. Bagley,* 473 U.S. 667, 682 (1985)). A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial." *Kyles,* 514 U.S. at 434 (quoting *Bagley,* 473 U.S. at 678).

Dr. Cihak testified regarding his "guesstimate" that, based on his examination of the contents of Fred's stomach, Fred had eaten "probably several hours before he – within several hours of his death." There are many factors that affect digestion, and Dr. Cihak offered that "one can never be exact because one doesn't know at the time of autopsy what was going on necessarily from the time that victim has eaten." He also explained that determining how long contents had been in the stomach was "a very controversial area. And there are people that feel some factors either speed or delay, and other people will take the opposite. This is a very, let us say, not scientifically identified area." Dr. Cihak also testified

that his findings had been "peer review[ed]." In his post-conviction claims, Shackelford contended that the State withheld exculpatory evidence by failing to disclose the peer review notes of Dr. John Howard. However, as the district court found below, Shackelford was provided with the notes of Dr. Howard but was not provided with the abstracts that accompanied the notes, which consisted of several scientific articles questioning the validity of determining a victim's time of death based upon stomach content. As the court pointed out, the abstracts came from medical journals that were generally available and did not contradict Dr. Cihak's testimony that he could offer only a "guesstimate" of the time of death.

On appeal, Shackelford's only statement regarding the notes of Dr. Howard is as follows: "The State failed to disclose material which would have undermined the testimony of Dr. Cihak. This evidence consists of peer review notes provided by Dr. John Howard concerning Dr. Cihak's 'guesstimate' of the time of death based on stomach contents." Shackelford argues nothing about how the abstracts or the notes would have undermined the testimony, nor how he was prejudiced by any failure to disclose the notes. Furthermore, we find that there was no prejudice because Dr. Cihak himself testified that determining time of death based on stomach contents was a "controversial" and "not scientifically identified" area. We find that the district court did not err in denying Shackelford's *Brady* claim because he has not shown the reasonable probability of a different result.

c. Shackelford was not deprived of his right to counsel of choice.

Shackelford argues that because the Latah County Sheriff's Department seized nearly $5,000 in cash from him, he could not afford to hire a lawyer. He contends in his brief on appeal that he solicited at least four private criminal defense lawyers for representation, including James Siebe, and testified that the $5,000 could have covered the expense of hiring an attorney for his initial appearance. Shackelford asserts that the failure to allow him to choose his own counsel violates his qualified right to choice of counsel and constitutes prejudicial error per se.

The State maintains that Shackelford failed to establish that $5,000 would have retained an attorney to represent him in a capital double murder case and therefore this claim fails. The State also argues that Shackelford has not challenged the district court's findings, particularly with regard to his "evasiveness," and that the $5,000 would have been insufficient to do more than retain counsel for the "initial proceedings." In addition, Shackelford presented no evidence that he had assets close to the $500,000 trial counsel were paid to represent Shackelford.

The Sixth Amendment guarantees defendants in criminal cases the right to adequate representation and to a qualified right to choice of counsel, but "those who do not have the means to hire their own lawyers have no cognizable complaint so long as they

process." *State v. Severson,* 147 Idaho 694, ___, 215 P.3d 414, 443 (2009) (quoting *State v. Martinez,* 125 Idaho 445, 453, 872 P.2d 708, 716 (1994)). The presence of errors alone, however, does not require the reversal of a conviction. *State v. Moore,* 131 Idaho 814, 823, 965 P.2d 174, 183 (1998). The cumulative effect of the errors we have noted, when viewed in relation to the totality of the evidence presented at trial, did not deprive Shackelford of a fair trial.

B. Sentencing Phase

The State has cross-appealed the district court's grant of post-conviction relief under *Ring v. Arizona,* 536 U.S. 584 (2002), which set aside Shackelford's death sentences for resentencing by a jury. The State argues that, because the weighing of mitigating factors under I.C. § 19-2515(c) does not increase the penalty from life to death, but actually reduces the penalty from death to life, the weighing process is not the functional equivalent of an element of a greater offense and, therefore, the jury was not mandated to complete the weighing process in Shackelford's case. In addition, the State argues that since the jury's first-degree murder verdicts established that Shackelford murdered Donna and Fred at the same location and date, it follows that the jury found the multiple murder aggravator of I.C. § 19-2515(h)(2) (2000) beyond a reasonable doubt.

Shackelford contends that his death sentence is unconstitutional under *Ring* because the jury did not

make the findings of fact that made Shackelford eligible for the sentence of death. He argues that the jury could not have found the aggravating circumstance under I.C. § 19-2515(h)(2) because the jury did not take part in Shackelford's sentencing proceedings and the guilt-phase verdict is not sufficient to conclude that the jury would have found the statutory aggravating circumstances beyond a reasonable doubt. Alternatively, Shackelford argues that even if this Court finds that the district judge could permissibly infer the requisite finding of the statutory aggravator in this case, the district court's vacation of Shackelford's death sentence must be affirmed because the jury did not weigh the aggravator against the mitigating circumstances.

Both Shackelford and the State agree that *Ring v. Arizona* applies because the Supreme Court released the decision in *Ring* during the time the direct review of this case was pending. *See Griffith v. Kentucky,* 479 U.S. 314, 323 (1987). The district court found that Shackelford's death sentence should be set aside because a jury, not a judge, must weigh the mitigating factors against the aggravating factors. The court did not agree with Shackelford's contention, however, that the jury did not find any of the aggravating factors. Instead, the district court found that the jury's verdicts for first-degree murder of both Donna and Fred established the existence of multiple murders and thus found the statutory aggravator beyond a reasonable doubt pursuant to I.C. § 19-2515(h)(2). Specifically, the court stated: "[T]he jury

found the Petitioner guilty of the first degree murders of both Donna Fontaine and Fred Palahniuk at the same location and on the same date. Those verdicts, standing alone, appear to establish the existence of multiple murders which constitutes a statutory aggravator beyond a reasonable doubt."

The jury here found Shackelford guilty of the first-degree murder of both Donna and Fred by general verdict, which respectively read: "As to the charge of First Degree Murder of Donna Fontaine [Fred Palahniuk], we, the Jury in the above entitled cause, find the defendant: Guilty." The verdicts for the murders of both Donna and Fred were based on jury instructions that instructed the jury to find beyond a reasonable doubt that "the killing occurred in Latah County, and in the State of Idaho" and that "the killing occurred on or about the 29th day of May, 1999." The district court's finding of aggravating factors in its original imposition of the death sentences was based on both I.C. § 19-2515(h)(2) (2000) and I.C. § 19-2515(h)(10) (2000), in the case of Donna, and I.C. § 19-2515(h)(2), in the case of Fred. In its Findings of the Court in Considering Death Penalty, the district court found, as to Donna's murder, that the State had proven beyond a reasonable doubt two statutory aggravating factors, including: (1) at the time the murder was committed the defendant also committed another murder, I.C. § 19-2515(h)(2), and (2) the murder was committed against a witness or potential witness in a criminal or civil proceeding because of such proceeding, I.C. § 19-2515(h)(10). As

to Fred's murder, the court found beyond a reasonable doubt one statutory aggravating factor, that at the time the murder was committed the defendant also committed another murder, I.C. § 19-2515(h)(2).

The Sixth Amendment entitles capital defendants "to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Ring,* 536 U.S. at 589. The effect of *Ring* was to convert statutory aggravating circumstances relevant to sentencing into "the functional equivalent of an element of a greater offense," which must be proved to a jury beyond a reasonable doubt. *Id.* at 606-09; *Apprendi v. New Jersey,* 530 U.S. 466, 482-84 (2000). Thus, *Ring* rendered unconstitutional the sentencing scheme of I.C. § 19-2515 (2001), which required the trial judge to make the factual findings regarding the existence of aggravating circumstances. *State v. Lovelace* (*Lovelace I*), 140 Idaho 53, 66-67, 90 P.3d 278, 291-92 (2003). "This Court must first resolve whether the error is harmless beyond a reasonable doubt where the statutory aggravating factors, which render a defendant death eligible, were neither included in the instructions to the jury nor proven beyond a reasonable doubt." *State v. Lovelace* (*Lovelace II*), 140 Idaho 73, 79, 90 P.3d 298, 304 (2004). This Court will find harmless error under such circumstances only if no reasonable jury could find that the State failed to prove the aggravating factors beyond a reasonable doubt. *Id.*

Based in part on the reasoning presented in a line of Alabama cases,[12] the State maintains that verdicts produced at the guilt stage of a trial can show that the jury found a defendant guilty of aggravating factors. These findings by the jury in this instance, the State argues, meet the criteria for the multiple-murder aggravator, I.C. § 19-2515(h)(2). A similar argument was advanced by the State in *Lovelace II*. There, Lovelace had been found guilty of first-degree murder and first-degree kidnapping. *Lovelace I*, 140 Idaho at 59, 90 P.3d at 284. However, the State argued that because the jury had found Lovelace guilty of kidnapping, it was harmless error that the trial court did not include the statutory aggravating factors in the instructions to the jury. *Lovelace II*, 140 Idaho at 79, 90 P.3d at 304. This Court noted that the State was "asking the Court to determine what the jury would have found had it been presented with instructions defining [the statutory aggravating factors that were] to be applied to the facts surrounding the murder." *Id.*

To engage in appellate hindsight on this issue, such as that advanced by the State, is constitutionally infirm. First, it violates the jury-trial guarantee for a court to "hypothesize a guilty verdict that was never in fact rendered – no matter how inescapable the findings to support the verdict might be[.]"

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[12] The cases include *Turner v. State*, 924 So.2d 737 (Ala. Crim. App. 2002); *Irvin v. State*, 940 So.2d 331 (Ala. Crim. App. 2005); and *Tomlin v. State*, 909 So.2d 213 (Ala. Crim. App. 2002).

Sullivan v. Louisiana, 508 U.S. 275, 279 (1993). Next, the Sixth Amendment "requires more than appellate speculation about a hypothetical jury's action." *Id.* at 280. Moreover, to accept the State's argument would be to look at the form of the jury verdict, rather than the effect of using it to sentence Shackelford to death. *Ring* instructs that this cannot be done. 536 U.S. at 604. Rather, when presented with this same argument by Arizona – that the defendant had been found guilty of a crime which could also serve as an aggravating factor – the Supreme Court noted that this argument overlooks the relevant inquiry of effect, rather than form. *Id.* Instead, if "a State makes an increase in a defendant's authorized punishment contingent on the finding of fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." *Id.* at 602. Therefore, a "defendant may not be exposed to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone." *Id.* at 602 (quoting *Apprendi*, 530 U.S. at 483) (alterations removed).

In this case, the charge to the jury on first-degree murder for both Donna and Fred had elements including that the killing occurred in Latah County and on or about May 29, 1999. The verdict form reads simply: "As to the charge of First Degree Murder of Donna Fontaine [Fred Palahniuk], we, the Jury in the above entitled cause, find the defendant: Guilty." There was no finding by this jury that, at the same

time one murder was committed, the defendant committed another murder.

Therefore, we affirm the district court's decision vacating Shackelford's sentence and its determination that Shackelford must be resentenced by a jury under *Ring* because we cannot find beyond a reasonable doubt that a reasonable jury could find that the State proved that Donna and Fred were killed at the same time. Without analyzing whether *Ring* requires a jury to weigh mitigating factors, this Court finds that the jury was required to find the aggravator, and such a finding was not explicit in the first-degree murder verdicts.

III. CONCLUSION

We affirm the district court on all issues. We affirm on the order for resentencing on different grounds and remand for a sentencing hearing pursuant to § 19-2515 (2008).

Chief Justice EISMANN and Justices J. JONES, W. JONES and HORTON, **CONCUR**.

CASE NO. CV01-04272
April 8, 2005 9:40 AM
CLERK OF DISTRICT COURT
LATAH COUNTY
BY [Illegible] DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

DALE CARTER SHACKELFORD Petitioner, vs. STATE OF IDAHO, Respondent.	Case No. CV-01-004272 [SP-01-00366] **MEMORANDUM DECISION AND ORDER REGARDING THE PETITIONER'S MOTION FOR SUMMARY DISPOSITION**

The Petitioner, Dale Shackelford, has filed a motion for partial summary disposition of his claims under the Uniform Post-Conviction Procedures Act. I.C. §§ 19-4901-4911. Oral argument on the motion was heard on November 15 and 16, 2004. The Petitioner was represented by Mark Ackley and Kimberly Simmons of the State Appellate Public Defender's Office. The Petitioner participated by telephone from the Idaho State Correctional Institution in Boise. The State was represented by Robin Eckmann, Senior Deputy Prosecuting Attorney for Latah County. The Petitioner's motion is now ready for disposition.

(81) (2)

No. 10-589

Supreme Court, U.S.
FILED
FEB 15 2011
OFFICE OF THE CLERK

In The
Supreme Court of the United States

STATE OF IDAHO,

Petitioner,

v.

DALE CARTER SHACKELFORD,

Respondent.

On Petition For Writ Of Certiorari To The Idaho Supreme Court

PETITIONER'S REPLY BRIEF

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ARGUMENT IN REPLY

A. Introduction

Shackelford does not dispute that *Ring*[1] error is subject to harmless error analysis, but contends the Idaho Supreme Court (1) conducted a "*de facto*" harmless error analysis, (2) rejected the trial court's conclusion "that because the murders were committed on the same date and at the same location, the murders necessarily were committed 'at the same time,'" and (3) concluded the "evidence presented at trial did not prove beyond a reasonable doubt that the murders were committed 'at the same time.'" Shackelford further contends there will be little, if any, impact on future cases because judge-sentencing states have adopted procedures for a jury determination of statutory aggravating factors.

Contrary to Shackelford's contention, the state has not misconstrued the Idaho Supreme Court's decision because the underlying analysis supporting the decision is based upon the erroneous conclusion that *Ring* error is structural and cannot be reviewed for harmlessness. Nor did the Idaho Supreme Court opine that multiple murders committed on the same date and location fail to meet the requirements of the multiple murder aggravator. Rather, the court discussed only the charging document and the verdict forms, ignoring the evidence presented at trial, to conclude *Ring* error is structural and that "[t]here

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[1] *Ring v. Arizona*, 536 U.S. 584 (2002).

was no finding by this jury that, at the same time one murder was committed, the defendant committed another murder." Further, the Idaho Supreme Court's conclusion that the state failed in its burden of establishing harmless error was based upon the erroneous conclusion that *Ring* error is structural and cannot be reviewed for harmlessness. Finally, Shackelford has grossly understated the impact of the Idaho Supreme Court's conclusion that *Ring* error is structural because it could impact any case in which the jury is improperly advised regarding the elements of a statutory aggravating factor not just those cases in which defendants were not sentenced by a jury.

B. The Idaho Supreme Court Did Not Conduct A *De Facto* Harmless Error Analysis

Shackelford contends the state has misstated the Idaho Supreme Court's holding because the court "applied a *de facto* harmless error analysis of the *Ring* error" and "[n]o fair reading of the decision . . . reveals that the Court was treating *Ring* error in this case as structural" since the court did not use the word "structural" in its opinion. Brief in Opp. at 3-6. While it is true the Idaho Supreme Court did not expressly state "*Ring* error is structural and cannot be reviewed for harmless error," based upon the court's reliance upon *Sullivan v. Louisiana*, 508 U.S. 275 (1993), and *State v. Lovelace*, 90 P.3d 298 (Idaho 2004), it is clear the court's decision was based upon the conclusion that since the jury was not instructed regarding the multiple murder aggravator, the court

could not engage in harmless error analysis because the failure to instruct was structural error.

In *Sullivan*, this Court reasoned that an erroneous reasonable doubt jury instruction "vitiates all the jury's findings," which then permits the reviewing court to "only engage in pure speculation." 508 U.S. at 281 (emphasis in original). In *Lovelace*, the Idaho Supreme Court cited *Neder v. United States*, 527 U.S. 1, 10 (1999), and recognized, "The Supreme Court has applied harmless error analysis to a jury instruction that omits an essential element." 90 P.3d at 79. The state court explained, "When a jury is not instructed as to an element of an offense, the standard for determining harmlessness is whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element." *Lovelace*, 90 P.3d at 79. The court recognized, "[t]he State is asking the Court to determine what the jury would have found had it been presented with instructions defining the language of [the statutory aggravating factor], that was to be applied to the facts surrounding the murder." *Id.* Because the "facts in evidence contesting that the murder was committed in perpetration of kidnapping" were contested, the court concluded "application of harmless error [was] inappropriate." *Id.*

In Shackelford's case, the Idaho Supreme Court again concluded the state was "'asking the Court to determine what the jury would have found had it been presented with instructions defining [the statutory aggravating factors that were] to be applied to

the facts surrounding the murder.'" App. at 78 (quoting *Lovelace*, 90 P.3d at 304) (brackets in original). However, instead of reviewing the facts as it did in *Lovelace*, the court cited *Sullivan*, and concluded:

> To engage in appellate hindsight on this issue, such as that advanced by the State, is constitutionally infirm [because] it violates the jury-trial guarantee for a court to "hypothesize a guilty verdict that was never in fact rendered – no matter how inescapable the findings to support the verdict might be" [and] the Sixth Amendment "requires more than appellate speculation about a hypothetical jury's action."

App. at 79-80 (quoting *Sullivan*, 508 U.S. at 279-80). Moreover, unlike *Lovelace*, in which the court concluded the evidence regarding the statutory aggravating factor was contested making harmless error review inappropriate, 90 P.3d at 79, not only did Shackelford fail to challenge the assertion that the murders were committed at the same time, but the state court examined only the charging language from the information and the verdict forms, concluding, "There was no finding by this jury that, at the same time one murder was committed, the defendant committed another murder." App. at 79-80.

The Idaho Supreme Court's analysis is contrary to *Neder*, 527 U.S. at 8, where this Court explained, "Unlike such defects as the complete deprivation of counsel or trial before a biased judge, an instruction that omits an element of the offense does not

necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." (Emphasis in original.) Rather than focusing upon *Sullivan*, the charging language and the verdict forms, the Idaho Supreme Court should have asked "whether the record contains evidence that would rationally lead to a contrary finding with respect to the omitted element," *Neder*, 527 at 10, which in this case is the statutory aggravating factor – whether "at the time the murder was committed the defendant also committed another murder," I.C. § 19-2515(h)(2) (2000). Therefore, when the Idaho Supreme Court concluded, "because we cannot find beyond a reasonable doubt that a reasonable jury could find that the State proved that Donna and Fred were killed at the same time," App. at 80, it was because the court concluded the error was structural under *Sullivan*, and could not be reviewed for harmlessness. This assertion is further exemplified by the court's final statement "that the jury was required to find the aggravator, and such a finding was not explicit in the first-degree murder verdicts." App. at 80. There simply is no requirement under *Neder* and its progeny to focus exclusively upon the charging language and verdict forms. The state court's finding was based upon language from *Sullivan*, 508 U.S. at 279, ignoring the fact that *Neder* permits a review for harmlessness even when the jury is not instructed regarding the element of an offense, such as the statutory aggravating factor in this case.

As in *Washington v. Recuenco*, 548 U.S. 212 (2006), the question is whether sentencing enhancement error – in this case *Ring* error – is subject to harmless error analysis at all, and whether the instructional error made in this case – failing to instruct on the multiple murder aggravator – is more akin to the missing element as in *Neder*, or the structural error described in *Sullivan*. Based upon Shackelford's failure to assert the error is more akin to structural error, this case is virtually indistinguishable from *Neder*-type error where the appellate court made a finding on an element that went beyond the jury's express verdict, but where that finding was unquestionably supported by the evidence, particularly since Shackelford never questioned whether the murders were committed at the same time, which he also fails to dispute in his Brief in Opposition.

C. The Idaho Supreme Court Did Not Define "At The Same Time"

In two related arguments, Shackelford contends this Court should deny certiorari because the state is allegedly challenging the Idaho Supreme Court's definition of "at the same time" in the multiple murder aggravator and asking this Court to "reexamine the facts of this case" in concert with the state court's definition. Brief in Opp. at 5-7.

While the state readily acknowledges the general rule that this Court does not review issues of state law, *Barclay v. Florida*, 493 U.S. 939, 947 (1983), the

Idaho Supreme Court's decision was not based upon a state law holding. Not only did the Idaho Supreme Court fail to define the phrase, "at the same time," in the multiple murder aggravator, the court never examined or even discussed any of the evidence presented at Shackelford's trial supporting the multiple murder aggravator. Rather, the court discussed only the charge and the verdict forms in concluding "[t]here was no finding by this jury that, at the same time one murder was committed, the defendant committed another murder." App. at 79-80. In fact, the Idaho Supreme Court expressly relied upon the federal Constitution, stating, "To engage in appellate hindsight on this issue, such as that advanced by the State, is constitutionally infirm." App. at 78. As detailed above, the lower court's decision was premised upon the mistaken belief that *Ring* error is structural, which cannot be reviewed for harmlessness. Such a conclusion is clearly a federal, not a state law question that can and should be reviewed by this Court.

D. The Idaho Supreme Court's Erroneous Interpretation Of The Federal Constitution Creates A Continuing Analytical Difficulty

Finally, Shackelford contends the Idaho Supreme Court's decision will have little or no impact on future or pending cases because "[t]here are no Idaho capital cases which are pending on direct review which involve *Ring* error." Brief in Opp. at 7. Irrespective of whether Idaho still has pending direct review cases

involving *Ring* error, the issue continues to be a source of contention as demonstrated in *Rhoades v. State*, 233 P.3d 61 (Idaho 2010), which involves the retroactivity of *Ring* under Idaho law. In *Rhoades*, 233 P.3d at 63, the Idaho Supreme Court consolidated the cases of six post-conviction petitioners who contended they should be given sentencing relief under *Ring*, and whose cases had been remanded by this Court for reconsideration in light of *Danforth v. Minnesota*, 552 U.S. 264 (2008).[2] Expressly abandoning its prior rule of retroactivity, the Idaho Supreme Court "explicitly adopt[ed] the *Teague* standard in criminal cases on collateral review," *Rhoades*, 233 P.3d at 64, but also concluded that decisions of retroactivity in Idaho "should reflect independent judgment, based upon the concerns of this Court and the uniqueness of our state, our Constitution and our long-standing jurisprudence," *id.* at 70.

Although it might be presumed that a state court's adoption of a new rule of retroactivity under state law is a state law question, Rhoades and four other petitioners have filed a petition for certiorari that remains pending before this Court. *Rhoades v.*

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[2] In *Danforth*, this Court concluded the federal retroactivity doctrine articulated in *Teague v. Lane*, 489 U.S. 288 (1989), does not constrain the authority of state courts to give broader effect to new rules of criminal procedure.

Idaho, #10-7831. Additionally, numerous other death-sentenced inmates in Idaho have filed successive post-conviction petitions raising new *Ring* issues.[3]

More importantly, despite Shackelford's assertion to the contrary, based upon the Idaho Supreme Court's decision, any mistake in the jury instructions involving statutory aggravating factors cannot be reviewed for harmlessness because, according to the court, "[t]o engage in appellate hindsight on this issue, . . . is constitutionally infirm" because "it violates the jury-trial guarantee for a court to 'hypothesize a guilty verdict that was never in fact rendered – no matter how inescapable the findings to support the verdict might be[.]' " App. at 78-79 (quoting *Sullivan*, 508 U.S. at 279). The Idaho Supreme Court's opinion will perpetuate confusion and inconsistent results because harmless error analysis is appropriate if an element of the underlying offense is omitted or incorrectly defined, but the same is not true for a statutory aggravating factor, which, under *Ring*, is merely another element that must be proven beyond a reasonable doubt before the death penalty may be imposed.

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[3] *Leavitt v. State*, Idaho Supreme Court #38263; *Creech v. State*, district court #CV-PC-2008-06064; *Sivak v. State*, district court #CV-PC-2008-06170; *Row v. State*, district court #CV-PC-2008-06067. This is not an exhaustive list of death-sentenced inmates in Idaho that have filed successive post-conviction petitions requesting sentencing relief under *Ring* that remain pending.

This case provides an excellent vehicle for preventing the confusion that will result, particularly in the state courts, if the Idaho Supreme Court's decision is permitted to stand. At the very least, the Idaho Supreme Court should be required to reexamine the question in light of *Neder* and its progeny, particularly *Recuenco*, where this Court explained, "[f]ailure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural error." 548 U.S. at 222.

CONCLUSION

Petitioner respectfully requests that a writ of certiorari be granted and the judgment of the Idaho Supreme Court be summarily reversed.

Respectfully submitted,

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